F 2302

San Francisco
Law Library

No. 109249

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

ORIGINAL

No. 9218

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol 2142

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 284

Upon Petition for Enforcement of an Order of the National Labor Relations Board.

FILED
SEP 1 1939
PAUL P. O'BRIEN,

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 85-9-12-39

No. 9218

United States
Circuit Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 284

Upon Petition for Enforcement of an Order of the National Labor Relations Board.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 85-9-12-39

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer to complaint	15
Certificate of the National Labor Relations Board	557
Charge	1
Charge, Amended	2
Complaint and Notice of Hearing	4
Conclusions of Law	97
Decision and Order of National Labor Relations Board	60
Designation of additional portions of the record to be printed (Respondent's)	568
Designation of the portion of the record to be printed (Petitioner's)	561
Enforcement of an order of the National Labor Relations Board:	
Designation of additional portions of record on (Respondent's)	568
Designation of portions of record on (Petitioner's)	561
Petition for	106
Statement of points on	561
Findings of Fact	66

Index

Page

Intermediate Report of Special Master 35

Conclusions and Recommendations 54

Findings of Fact 38

Letter granting permission to apply for oral argument 59

Notice of Motion to dismiss complaint 31

Notice of Special Appearance of Los Angeles Brick and Clay Products Company 31

Oral argument, Letter granting permission to apply for 59

Order designating Trial Examiner 34

Order of National Labor Relations Board 99

Petition for enforcement of an order of the National Labor Relations Board 106

Statement of points to be relied upon by the Board 561

Testimony 114

Stipulation of Respondent re testimony and evidence 479

Exhibits for National Labor Relations Board:

2—Letter signed by Edward E. Hannum and Lawrence C. McNutt 123

3—Letter dated June 16, 1937, to Los Angeles Brick and Clay Products Company 128

4—Letter dated June 24, 1937, to Los Angeles Brick Company from Alberhill Clay Workers Union 137

Index Page

(Exhibits for Nat. Labor Relations Board Cont.):

8—Letter dated June 18, 1937, signed by J. E. Mills 380

9—Letter dated June 18, 1937, signed by A. O. Bodine 409

11—Products sold and delivered in this State, year 1936 485

12—Products sold and delivered in this State, year 1937—January to November, inclusive 491

13—Products sold and delivered to railroads in this State for delivery by railroads to points within the State of California January, 1936, to November, 1937, inclusive 496

14—Products sold and delivered to railroads in this State, January, 1936, to November, 1937, inclusive —intention of railroad to ship out of State indicated but actual destination unknown 498

17—Railroads used as carriers 500

Exhibits for respondent:

1—List of men passed through channels of payroll account from June 1, 1937, to July 31, 1937 392

Index Page

(Exhibits for respondent Cont.):

2—Notice dated June 2, 1937 signed by Los Angeles Brick and Clay Products Company 432

5—Kinds, quantities and value of sales 1936, 1937 481

6—Value of sales of all products delivered by company to destinations outside State of California in 1936 482

7—Value of sales of all products delivered by company to destinations outside State of California in 1937—January to November, inclusive 483

8—Statement from January, 1936, to November, 1937, showing the number of men, production in tons, inventory in tons and sales in tons for each month 507

9—Number of men on Alberhill payroll 510

10—U. S. Department of Commerce Bulletin—"Clay-Products (including Pottery) Nonclay Refractories and Sand-Lime Brick—Production and Stocks, 1936" 513

11—All orders taken during April, May and June, 1937 554

Index Page

Witnesses for National Labor Relations Board:

Ashworth, William G.
—direct 223
—cross 236
—recross 249

Bodine, Arthur O.
—direct 347
—cross 365
—recross 369
—recalled, direct 390
—recalled, direct 398

Boontjer, Henry
—direct 203
—cross 207
—redirect 208
—recross 209
—redirect 209

Cordero, Gregorio
—direct 215
—cross 219
—redirect 222

Dabich, Sam
—direct 310
—cross 314
—redirect 317

Gantz, Harry P.
—direct 381
—cross 386

Index Page

(Witnesses for Nat. Labor Relations Board Cont.):

German, Frank
—direct 277
—cross 281
—redirect 281

German, Lawrence H.
—direct 250
—cross 255
—redirect 256
—cross 256

Grier, James
—direct 271
—cross 277

Hannum, Art
—direct 299
—cross 303
—redirect 308
—recross 309
—redirect 310
—recross 310

Hannum, Edward E.
—direct 166
—cross 175
—redirect 180
—recross 182

Hazelton, Lester C.
—direct 189
—cross 196
—recross 201
—redirect 202

Index

Page

(Witnesses for Nat. Labor Relations Board Cont.):

Larson, Gustaf

—direct 285

—by Trial Examiner 291

—cross 292

—redirect 295

—cross 295

—by Trial Examiner 298

—recalled, direct 328

—cross 336

—redirect 343

—recross 343

—recalled, direct 441

—cross 442

—redirect 445

Lucas, Chester W.

—direct 257

—cross 265

McNutt, Lawrence C.

—direct 116

—cross 144

—redirect 163

—recross 166

—recalled, direct 282

—cross 283

—recross 284

—recalled, direct 461

Index Page

(Witnesses for Nat. Labor Relations Board Cont.):

Mills, John Ellis
—direct 369
—cross 376
—recross 381

Moss, Arnold
—direct 267
—redirect 271

Osborne, Sylvester
—direct 182
—cross 187

Roddy, Thomas A.
—direct 210
—cross 214

Stewart, Glenn C.
—direct 465
—cross 471

Wenker, Gerald
—direct 318
—cross 325

Witnesses for respondent:

Baer, John
—direct 445
—cross 450
—redirect 456
—recross 458

Index Page

(Witnesses for respondent Cont.):
Bodine, Arthur O.
—direct 430
—redirect 441

Dameron, Mark C.
—direct 458

Gantz, Harry
—direct 425
—cross 429

Pressing, Henry
—direct 502
—cross 551

Randy, George
—direct 423

Reordan, W. C.
—direct 552
—cross 556

United States of America

Before the National Labor Relations Board

..........................Region

Case No. XXI, C287

In the Matter of

L. A. BRICK & CLAY PRODUCTS CO.

and

ALBERHILL CLAY WORKERS UNION
MINE MILL & SMELTER WORKERS.

Date filed June 15, 1937.
167 involved strike.

CHARGE.

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that the L. A. Brick & Clay Products Co., Alberhill, Calif., has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) and (5) of said Act, in that on or about June 2, 1937, the said employer did lay off approximately 47 members of the complaining union solely for their union activities, and on or about June 10, 1937, did refuse to recognize and to bargain with the Alberhill Clay Workers Union.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

ALBERHILL CLAY WORKERS UNION
By LAWRENCE C. McNUTT
LAWRENCE C. McNUTT, Sec.
Twin Springs, Corona, Calif.

Subscribed and sworn to before me this 15th day of June, 1937.

TOWNE NYLANDER

[Title of Board and Cause.]

AMENDED CHARGE.

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Los Angeles Brick & Clay Products Co. has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) and (5) of said Act, in that the company discharged and refused to reinstate:

L. C. McNutt, Thomas A. Roddy, Arnold Moss, Gerald D. Wenker, Lester Hazelton on the third day of June, 1937, because of their union activity;

Edward Hannum on June 7, 1937, because of his union activity;

William G. Ashworth on June 8, 1937, because of his union activity;

James Grier on June 9, 1937, because of his union activity; and

Lawrence German, C. W. Starr, Lorrin E. Thorpe, Albert (Slim) Davis, Charles Willard, and Claude Pearl on or about June 3 to June 10, 1937, because of their union activity.

The company on or about June 25, 1937, refused to reinstate the individuals named above and the following:

C. W. Lucas, Sylvester Osborn, Frank German, Raymond Macht, Kenneth Norris,
Gregorio Cordero, C. Glenn Stewart, Art Hannum, M. J. Eaglin, Charles Bland, Sam Dabich, Nils Martinson, Juan Romero, Ernest Sill, M. G. Eaglin, and Mark Damron because of their union activity.

The company at some date after July 1, 1937, reinstated Sam Dabich, and Nils Martinson but at reduced pay and on different jobs than they had previously had because of their union activity.

On or about June 10, 1937, the union requested the company to bargain collectively with it as representative of all employees in the Alberhill plant except foremen, supervisors, and office employees, a majority of whom had previously designated the union as their representative. The company on that date and at all times since refused to bargain collectively with the union.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the name and official position of the person acting for the organization.)

ALBERHILL CLAY PRODUCTS WORKERS UNION No. 373

By LAWRENCE C. McNUTT,

Secretary and Treasurer.

Twin Springs, Corona, Calif.

Subscribed and sworn to before me this 5th day of December, 1937. David Persinger, Atty., N. L. R. B.

[Title of Board and Cause.]

COMPLAINT.

It having been charged by Alberhill Clay Products Workers' Union No. 373, Alberhill, California, that the Los Angeles Brick & Clay Products Co., 1078 Mission Road, Los Angeles, hereinafter referred to as respondent, at its plant at Alberhill, California, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, the National Labor Relations Board, by its Regional Director for the Twenty-first Region, as agent for the National Labor Relations Board, designated by National Labor Relations Board Rules and Regulations—Series 1, as amended, hereby alleges the following:

1. The respondent is and has been since January 10, 1900, a corporation organized under and existing by virtue of the laws of the State of California, having its principal office and place of business at 1078 Mission Road in the City of Los Angeles, County of Los Angeles, State of California. Respondent is now and at all times herein mentioned has been engaged at a plant in the town of Alberhill, County of Riverside, State of California, hereinafter called the plant, in the manufacture, sale, and distribution of face, fire, common, and paving brick; hollow, floor, drain and roofing tile; sewer pipe; and flue lining.

2. Respondent, in the course and conduct of its business, as aforesaid, causes and has continuously caused large quantities of the brick, tile, sewer pipe, and flue lining manufactured by it to be sold and transported in interstate commerce from its plant in the State of California to, into, and through states of the United States other than the State of California, territories of the United States, and foreign countries.

3. Alberhill Clay Products Workers' Union No. 373, hereinafter called the union, is a labor organization within the meaning of Section 2, subdivision 5 of the Act.

4. Respondent, by its officers and agents, while engaged at its plant as described in paragraphs one and two, hereof, did on or about the second day of

June, 1937, and on many and various succeeding dates to and including the tenth day of June, 1937, discharge those individuals, and each of them, whose names appear in Appendix A, hereinafter referred to as the individuals named in Appendix A, attached hereto and herewith incorporated into and made a part of this complaint, employed by respondent at its plant, and did refuse and at all times since said dates has refused and now does refuse to reinstate the said individuals named in Appendix A, and each of them.

5. Respondent discharged and refused and has refused and now does refuse to reinstate the said individuals named in Appendix A, and each of them, for the reason the said individuals named in Appendix A, and each of them, joined and assisted the union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

6. By its discharge of and refusal to reinstate the individuals named in Appendix A, and each of them, as set forth in paragraphs four and five, supra, respondent did interfere with, restrain, and coerce and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all said acts, and each of them, did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subdivision 1 of the Act.

7. By its discharge of and refusal to reinstate the individuals named in Appendix A, and each of them, as set forth in paragraphs four and five, hereof, respondent did discriminate and is discriminating in regard to hire and tenure of employment of the said individuals named in Appendix A, and each of them, and did thus discourage and is thus discouraging membership in the union, and by all said acts, and each of them, did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subdivision 3 of the Act.

8. Respondent, by its officers and agents, while engaged at its plant as described in paragraphs one and two hereof, did, on or about June 25, 1937, refuse, and at all times since that date has refused, and now does refuse to reinstate the individuals whose names appear in Appendix B, and each of them, hereinafter referred to as the individuals named in Appendix B, attached hereto and herewith incorporated into and made a part of this complaint, employed by respondent at its plant.

9. Respondent refused and has refused and now does refuse to reinstate said individuals named in Appendix B, and each of them, for the reason that said individuals named in Appendix B, and each of them, joined and assisted the union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

10. By its refusal to reinstate the individuals named in Appendix B, and each of them, as set forth in paragraphs eight and nine hereof, respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all said acts, and each of them, did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8, subdivision 1 of the Act.

11. By its refusal to reinstate the individuals named in Appendix B, and each of them, as set forth in paragraphs eight and nine hereof, respondent did discriminate and is discriminating in regard to hire and tenure of employment of the said individuals named in Appendix B, and each of them, and did thus discourage, and is thus discouraging membership in the union and by all said acts, and each of them, did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8, subdivision 3 of the Act.

12. Respondent, by its officers and agents, while engaged in the operations described in paragraphs one and two, hereof, did, on or about June 25, 1937, reinstate Sam Dabich and Nils Martinsen, and each of them, but did deprive the said Sam Dabich and Nils Martinsen, and each of them, of all rights and privileges previously enjoyed by them, and did reduce the rate of pay and wages of the said Sam Dabich and Nils Martinsen, and each of them, and

did assign the said Sam Dabich and Nils Martinsen, and each of them, to jobs other than the jobs which they had held prior to the 2nd day of June, 1937.

13. Respondent deprived the said Sam Dabich and Nils Martinsen, and each of them, of all rights and privileges previously enjoyed by them and reduced the rates of pay and wages of the said Sam Dabich and Nils Martinsen, and each of them, and did assign the said Sam Dabich and Nils Martinsen, and each of them, to jobs other than the jobs they had held prior to the 2nd day of June, 1937, for the reason that the said Sam Dabich and Nils Martinsen, and each of them, joined and assisted the union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

14. By its deprivation of the rights and privileges previously enjoyed by the said Sam Dabich and Nils Martinsen, and each of them, and by its reduction of the rates of pay and wages of the said Sam Dabich and Nils Martinsen, and each of them, and by its assignment of the said Sam Dabich and Nils Martinsen, and each of them, to jobs other than the jobs they had held prior to the 2nd day of June, 1937, all as set forth in paragraphs twelve and thirteen, hereof, respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all said

acts, and each of them, did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8, subdivision 1 of the Act.

15. By its deprivation of the rights and privileges previously enjoyed by the said Sam Dabich and Nils Martinsen, and each of them, and by its reduction of the rates of pay and wages of the said Sam Dabich and Nils Martinsen, and each of them, and by its assignment of the said Sam Dabich and Nils Martinsen, and each of them, to jobs other than the jobs they had held prior to the 2nd day of June, 1937, all as set forth in paragraphs twelve and thirteen, hereof, respondent did discriminate, and has discriminated, and is discriminating, in regard to hire and tenure of employment and other terms and conditions of employment of the said Sam Dabich and Nils Martinsen, and each of them, and did thus discourage and is thus discouraging membership in the union and, by all said acts, and each of them, did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8, subdivision 3 of the Act.

16. The employees of respondent engaged in the pits and in the production department of the plant, exclusive of supervisors, foremen, and office employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subdivision (b) of the Act.

17. On or about June 2, 1937, and June 5, 1937, a majority of the employees in the aforesaid unit designated the union as their representative for the purposes of collective bargaining with respondent, with respect to rates of pay, wages, hours of employment and other conditions of employment, said designation having been made by applications for membership in the union. At all times since said June 5, 1937, the union has been the representative for the purposes of collective bargaining of a majority of the employees in the unit, aforesaid, and has, by virtue of Section 9, subdivision (a) of the Act, been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

18. On or about June 10, 1937, while respondent was engaged at its plant as described in paragraphs one and two, hereof, the union in writing requested respondent to bargain collectively with it as representative of the employees in the aforesaid unit with respect to rates of pay, wages, hours of employment, and other conditions of employment.

19. Respondent, by its officers and agents, while engaged at its plant as described in paragraphs one and two, hereof, did on or about June 10, 1937, and at all times thereafter, refuse and has refused and now does refuse to bargain collectively with the

union with respect to rates of pay, wages, hours of employment, or other conditions of employment of the employees in the aforesaid unit.

20. By its refusal to bargain collectively with the union, as set forth in paragraph eleven, hereof, respondent did interfere with, restrain, and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all said acts, and each of them, did thereby engage in and is thereby engaging in unfair labor practices, within the meaning of Section 8, subdivision 1 of the Act.

21. By its refusal to bargain collectively with the union, as set forth in paragraph eleven, hereof, respondent did engage in, and is engaging in unfair labor practices within the meaning of Section 8, subdivision 5 of the Act.

22. The activities of respondent as set forth in paragraphs four to twenty-one, both inclusive, hereof, occurring in connection with the operations of respondent, as described in paragraphs one and two, hereof, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, territories of the United States, and with foreign countries and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

23. The aforesaid acts of respondent, as set forth in paragraphs four to twenty-one, both inclu-

sive, hereof, occurring in connection with the operations of respondent, described in paragraphs one and two, hereof, constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions 1, 3, and 5 and Section 2, subdivisions 6 and 7 of the Act.

Wherefore, the National Labor Relations Board on this 9th day of December, 1937, issues its complaint against the Los Angeles Brick & Clay Products Co., respondent herein.

NOTICE OF HEARING.

Please take notice that on the 16th day of December, 1937, in Room 745 Pacific Electric Building, Sixth and Main Sts., Los Angeles, Calif., at 9:30 o'clock in the forenoon, a hearing will be conducted before the National Labor Relations Board, by a Trial Examiner to be designated by it in accordance with its Rules and Regulations—Series 1, as amended, Article IV and Article II, Section 23, on the allegations set forth in the complaint hereinabove set forth, at which time and place you will have the right to appear in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Regional Director for the Twenty-first (21st) Region, acting in this matter as the agent of the National Labor Relations Board, an answer to the foregoing complaint, on or before the 15th day of December, 1937.

Enclosed herewith for your information is a copy of the Rules and Regulations, made and published by the National Labor Relations Board, pursuant to authority granted in the National Labor Relations Act. Your attention is particularly directed to Article II of said Rules and Regulations.

In witness whereof, the National Labor Relations Board has caused this, its complaint and its notice of hearing, to be signed by the Regional Director for the Twenty-first (21st) Region on the 9th day of December, 1937.

[Seal] TOWNE NYLANDER
Regional Director, 21st Region
National Labor Relations Board
745 Pacific Electric Bldg.
Los Angeles, California

APPENDIX A.

Wm. G. Ashworth, Thomas A. Roddy, Arnold Moss, James Grier, Gerald D. Wenker, Lester Hazelton, Lawrence German, L. C. McNutt, Edward Hannum, C. W. Starr, Albert (Slim) Davis, Chas. Willard, Claude Pearl.

APPENDIX B.

C. W. Lucas, Sylvester Osborn, Frank German, Raymond Macht, Kenneth Norris, C. Glenn Stewart, Art Hannum, M. J. Eaglin, Chas. Bland, Sam Dabich, Nils Martinson, Juan Romero, Ernest Sill, M. G. Eaglin, Mark Damron, Gregorio Cordero.

[Title of Board and Cause.]

ANSWER.

Comes now the respondent in the above entitled proceeding, and in answer to the formal complaint of the Regional Director, Twenty-first Region, National Labor Relations Board, admits, denies and alleges as follows:

I.

Answering paragraph II of said complaint, respondent denies that respondent in the course of conduct of its business caused, or has continuously or at any time caused large quantities of the brick, tile, sewer pipe or flue lining, or any other products manufactured by it to be sold or transported in interstate commerce from its plant in the State of California, to or into or through the states of the United States or any of them other than the State of California, or territories of the United States or foreign countries. In this connection respondent alleges that during the two years preceding the filing of this complaint, not to exceed ten per cent (10%) of the products manufactured by it have been sold and transported in interstate commerce from its plants in the State of California to, into or through the states of the United States other than the State of California, or territories of the United States or foreign countries, and that all of the materials used by respondent in the manufacture of its products in the State of California

are purchased or obtained by respondent within the State of California.

II.

Answering paragraph III of said complaint respondent is without knowledge concerning the allegations therein contained, and basing its denial upon that ground denies each and every such allegation.

III.

Answering paragraph IV of said complaint, respondent denies that respondent by its officers or agents, or otherwise or at all, either while engaged at respondent's plan as alleged in said paragraphs I and II or otherwise, did on or about the 2nd day of June, 1937, or at any other time, discharge those individuals, or any of them, listed in Appendix A attached to said complaint, or any other employees employed by respondent at its plant, and denies that respondent did refuse at any time or does now refuse, without just, reasonable and legal cause therefor, to reinstate any individuals or employees heretofore employed by respondent, whether listed in said Appendix A or otherwise.

IV.

Answering paragraph V of said complaint, respondent denies that respondent discharged or refused or has refused or now does refuse to reinstate the said individuals named in said Appendix A, or any of them, for the reason that said indi-

viduals, or any of them, joined or assisted the union or engaged in concerted activities with other employees for the purpose of collective bargaining or other mutual aid and protection, or by reason of any union activities or affiliation of said individuals or any of them. Respondent alleges that at no time prior to June 10, 1937, did it have any knowledge as to whether said individuals, or any of them, named in Appendix A, had been or were members of said union or any labor organization, and that at no time since said June 10, 1937, has respondent had any knowledge as to whether said individuals, or any of them, named in said Appendix A, other than Edward E. Hannum and Laurence C. McNutt, were or are members of said union or any labor organization.

V.

Answering paragraph VI of said complaint, respondent denies that by its alleged discharge of and/or by its alleged refusal to reinstate the individuals named in Appendix A, or any of them, as set forth in paragraphs IV and V of said complaint, or otherwise, respondent did interfere with or restrain or coerce, or is interfering with or restraining or coercing its employees, or any of them, in the exercise of the rights, or any of them, guaranteed or otherwise provided for in Section 7 of the Act, or by any other provision of the Act, or by all or any of said acts, did thereby engage in or is thereby engaging in unfair labor practices or any unfair

labor practice within the meaning of Section 8, Subdivision 1 of the Act, or any other Sections or provisions of the Act.

VI.

Answering paragraph VII of said complaint respondent denies that by its alleged discharge of or by its alleged refusal to reinstate the individuals named in said Appendix A, or any of them, as set forth in paragraphs IV and V of said complaint, or otherwise, respondent did discriminate or is discriminating in regard to hire or tenure of employment of the said individuals named in Appendix A, or any of them, or did thereby or otherwise discourage or is thereby or otherwise discouraging membership in the union or in any labor organization, or by all of said alleged acts, or any of them, did thereby or did otherwise engage in or is thereby or otherwise engaging in unfair labor practices or any unfair labor practice, within the meaning of Section 8, Subdivision 3 of the Act, or any other subdivisions, sections or provisions of said Act, or otherwise.

VII.

Answering paragraph VIII of said complaint, respondent denies that respondent either by its officers or agents, or otherwise, or at all, either while engaged at its plant as alleged in paragraphs I and II of said complaint, or otherwise, or at all, did on or about June 25, 1937, or at any other time, refuse,

and denies that at all times or at any time since that date has respondent refused or that respondent does now refuse to reinstate without just, reasonable and legal cause therefor, any individuals or employees heretofore employed by respondent whether named in said Appendix B or otherwise.

VIII.

Answering paragraph IX of said complaint respondent denies that respondent refused or has refused or now does refuse, to reinstate said individuals named in Appendix B, or any of them, for the reason that said individuals named in said Appendix B, or any of them, joined or assisted the said union, or any labor organization, or engaged in concerted or any activities with other employees for the purpose of collective bargaining or other mutual aid and protection, or by reason of any union activities or affiliation of said individuals, or any of them. Respondent alleges that at no time did it have, nor has it now any knowledge as to whether said individuals, or any of them named in Appendix B, had been, or were, or now are members of said union, or any labor organization.

IX.

Answering paragraph X of said complaint respondent denies that by its alleged refusal to reinstate the individuals named in Appendix B, or any of them, as set forth in paragraphs VIII and IX of

said complaint, or otherwise, respondent did interfere with or restrain or coerce, or is interfering with or is restraining or is coercing its employees, or any of them, in the exercise of the rights or any rights guaranteed or otherwise provided for in Section 7 of the said Act, or by any other sections, subdivisions or provisions of said Act, or by all of said alleged acts, or any of them, did thereby or otherwise engage in, or is thereby or otherwise engaging in unfair labor practices within the meaning of Section 8, Subdivision 1 of the said Act, or any other sections, subdivisions or provisions of the said Act.

X.

Answering paragraph XI of said complaint respondent denies that by its alleged refusal to reinstate the individuals named in Appendix B, or any of them, as set forth in paragraphs VIII and IX of said complaint, or otherwise, respondent did discriminate or is discriminating in regard to hire or tenure of employment of the said individuals named in Appendix B, or any of them, or did thereby, or otherwise, discourage, or is thereby, or otherwise, discouraging membership in the said union, or by all of said alleged acts, or any of them, did thereby, or otherwise, engage in, or is thereby or otherwise engaging in unfair labor practices within the meaning of Section 8, Subdivision 3 of the Act, or of any other sections, subdivisions or provisions of the said Act.

XI.

Answering paragraph XII of said complaint, respondent denies that respondent by its officers or agents or otherwise, either while engaged in the operations described in paragraphs I and II of said complaint or otherwise, did on or about June 25, 1937, or at any time, reinstate Sam Dabich or Nils Martinsen, and denies that respondent did deprive or has deprived the said Sam Dabich or Nils Martinsen of all or any rights or privileges previously enjoyed by them, or either of them, or did reduce the rate of pay or wages of said Sam Dabich or Nils Martinsen or did assign said Sam Dabich or Nils Martinsen to jobs other than the jobs which they or either of them had held prior to the 2nd day of June, 1937. Respondent alleges that said Sam Dabich and Nils Martinsen and each of them did on or about June 11, 1937, voluntarily and of their own accord and volition and without any act of respondent, cease and terminate their employment; that thereafter, on a date subsequent to said June 11, 1937, said Sam Dabich and Nils Martinsen, and each of them, did request of respondent that they and each of them be re-employed by respondent and be given any position then available at respondent's plant and for which they were qualified by reason of their experience and ability; that thereupon respondent did re-employ said Sam Dabich and Nils Martinsen, and each of them, in and at jobs which were then available and for which said Sam Dabich

and Nils Martinsen were qualified by reason of their experience and ability and at the then prevailing rate of pay for said jobs.

XII.

Answering paragraph XIII of said complaint, respondent denies that respondent deprived the said Sam Dabich and Nils Martinsen, or either of them, of all or any rights or privileges previously enjoyed by them, or either of them, or reduced the rates of pay or wages of the said Dabich and Martinsen, or either of them, or did assign the said Dabich and Martinsen, or either of them, to jobs other than the job or jobs they or either of them had held prior to the 2nd day of June, 1937, for the reason that the said Dabich and Martinsen, or either of them, joined or assisted the union or any labor organization or engaged in concerted or any activities with other employees for the purpose of collective bargaining or other mutual aid or protection, or by reason of any union activities or affiliation of said Dabich and Martinsen, or either of them.

XIII.

Answering paragraph XIV of said complaint, respondent denies that by its alleged deprivation of the or any rights or privileges previously enjoyed by the said Dabich and Martinsen, or either of them, or by its alleged reduction of the rates of pay or wages of the said Dabich or Martinsen, or either of them, or by its alleged assignment of the said

Dabich and Martinsen, or either of them, to jobs other than the jobs they or either of them had held prior to the 2nd day of June, 1937, as set forth in paragraphs XII and XIII of said complaint or otherwise, respondent did interfere with or restrain or coerce or is interfering with or is restraining or is coercing its employees or any of them in the exercise of the or any rights guaranteed in Section 7 of the said Act or in any of the subdivisions, sections or provisions of said Act, or otherwise, or by all or any of said alleged acts or any of them did thereby or otherwise engage in or is thereby or otherwise engaging in unfair labor practices or any unfair labor practice within the meaning of Section 8, subdivision 1, of the said Act or of any subdivisions, sections or provisions of the said Act.

XIV.

Answering paragraph XV of said complaint, respondent denies that by its alleged deprivation of the or any rights or privileges previously enjoyed by the said Sam Dabich and Nils Martinsen or either of them, or by its alleged reduction of the rates of pay or wages of the said Dabich and Martinsen, or either of them, or by its alleged assignment of the said Dabich and Martinsen, or either of them, to jobs other than the job or jobs they or either of them had held prior to the 2nd day of June, 1937, as set forth in paragraphs XII and XIII of said complaint, or otherwise, respondent

did discriminate or has discriminated or is discriminating in regard to hire or tenure of employment or other terms or conditions of employment of the said Dabich and Martinsen, or either of them, or did thereby or otherwise discourage or is thereby or otherwise discouraging membership in the union or by all of said alleged acts or any of them did thereby or otherwise engage in or is thereby or otherwise engaging in unfair labor practices or any unfair labor practice within the meaning of Section 8, Subdivision 3 of the said Act, or of any subdivisions, sections, or provisions of the said Act.

XV.

Answering paragraph XVI of said complaint, respondent denies that the employees of respondent engaged in the pits and in the production department of respondent's said plant, whether exclusive of supervisors, foremen and office employees, or otherwise, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subdivision b, of said Act, or of any subdivisions, sections or provisions of the said Act.

XVI.

Answering paragraph XVII of said complaint, respondent alleges that it has no knowledge, with respect to the matters therein alleged, or any of them, and basing its denial upon that ground denies generally and specifically each and every allegation therein contained.

XVII.

Answering paragraph XVIII of said complaint, respondent alleges that at no time prior to June 10, 1937, or thereafter, did the said union represent nor has it represented to respondent that the said union was or is representative of a majority of the employees employed by respondent at its said plant or of any unit thereof, whether the unit referred to in paragraphs XVI and XVII of said complaint or any other unit, and respondent alleges that it has had no knowledge nor does it now have any knowledge as to whether said union represents a majority of the employees of respondent or of any appropriate unit thereof, whether it be the unit hereinabove referred to or otherwise, for the purpose of collective bargaining within the meaning of said Act or otherwise. That the only notice or knowledge acquired by respondent with respect to said union or with respect to whether said union represented or purported to represent any of the employees of respondent was received by respondent at the time of delivery to its superintendent at said plant on June 10, 1937 of a typewritten paper, a copy of which is attached hereto, marked Exhibit "A", and by this reference made a part hereof as fully as though set forth in words and figures herein.

Except as hereinbefore alleged or admitted, respondent denies that on or about June 10, 1937 while respondent was engaged at its plant as described in paragraphs I or II hereof, or otherwise, the said union in writing, or otherwise, requested

respondent to bargain collectively with it as representative of the employees in the said unit with respect to rates of pay or wages or hours of employment, or other conditions of employment.

XVIII.

Answering paragraph XIX of said complaint, respondent denies that respondent, by its officers or agents or otherwise, either while engaged at its plant as described in paragraphs I and II of said complaint or otherwise, did on or about June 10, 1937, or at all or any times thereafter, refuse or has refused or now does refuse to bargain collectively within the meaning of or as required by the provisions of the said Act, with the said union with respect to rates of pay, wages, hours of employment or other conditions of employment of the employees in said unit or any appropriate unit of employees of respondent. Respondent alleges, however, that said union at no time has represented nor does it now represent a majority of the employees in said or any unit for the purposes of collective bargaining in respect to rates of pay or wages or hours of employment or other conditions of employment, and respondent further alleges that at no time has respondent been requested by said union or by any union representing a majority of the employees of said or any unit, to bargain collectively with said union or any union with respect to rates of pay or wages or hours of employment or other conditions of employment.

XIX.

Answering paragraph XX of said complaint, respondent denies that by its alleged refusal to bargain collectively with the said union as set forth in paragraph XI of said complaint, or otherwise, respondent did interfere with or restrain or coerce or is interfering with or restraining or coercing its employees, or any of them, in the exercise of the or any rights guaranteed in Section 7 of the said Act, or in any sections, subdivisions or provisions of the said Act, or by all or any of said alleged acts did thereby or otherwise engage in or is thereby or otherwise engaging in unfair labor practices or any unfair labor practice within the meaning of Section 8, subdivision 1, of the said Act, or of any subdivisions, sections or provisions of the said Act.

XX.

Answering paragraph XXI of said complaint, respondent denies that by its alleged refusal to bargain collectively with the said union, as set forth in paragraph XI of said complaint, respondent did engage in or is engaging in unfair labor practices within the meaning of Section 8, subdivision 5, of the said Act, or of any subdivisions, sections or provisions of the said Act.

XXI.

Answering paragraph XXII of said complaint, respondent denies that the alleged activities, or any of them, of respondent as set forth in paragraphs IV to XXI, both inclusive, of said complaint, or in

any of said paragraphs, either occurring in connection with the operations of respondent as described in paragraphs I or II of said complaint or otherwise, have or any of them has a close or intimate or substantial relation to trade or traffic or commerce among the several states or any of them, or among the territories of the United States or any of them, or with foreign countries or any of them, or have led or tend to lead to labor disputes burdening or obstructing commerce or the free flow of commerce or otherwise.

XXII.

Answering paragraph XXIII of said complaint, respondent denies that the alleged acts of respondent, as set forth in paragraphs IV to XXI, both inclusive, of said complaint, or in any of said paragraphs or otherwise, either occurring in connection with the operations of respondent as described in paragraphs I or II of said complaint or otherwise, constitute or have constituted unfair labor practices or an unfair labor practice affecting commerce within the meaning of Section 8, subdivisions 1, 3 and 5, and Section 2, subdivisions 6 and 7, of the said Act, or within the meaning of any subdivisions, sections or provisions of said Act.

Wherefore, respondent prays that the complaint herein and all proceedings thereunder be dismissed, and for such other and further relief as may be meet, equitable and proper.

ELLIS, HOWLETT & MacLAREN
By ELMER H. HOWLETT
Attorneys for Respondent

EXHIBIT "A"

1. The Los Angeles Brick and Clay Products Company recognize and accept as the collective bargaining agent of its employees the recently formed Union known as the Alberhill Clay Workers Union, affiliated with the International Mine Mill and Smelter workers.

2. That all employees whose services were terminated since the first day of June? Nineteen hundred, Thirty-seven reasons of the reported depression in business and shortage of orders on hand to be filled, be reemployed and put to work at the Alberhill plant of the Los Angeles Brick and Clay Products Company *befoe* seven *thrity* A. M. Friday, the eleventh day of June, nineteen and *theity* seven, and in the exist*a*nce of said depression of business and lack of orders on hand that the men shall be given equal number of hours of work each month until said depression is over; thus relieving any man or group of men from standing the full brunt of said depression and that all overtime consisting of time over 8 hours in any one day and 40 hours in any week be paid at the rate of one and one-half time. This article to be in effect until July 15, 1937.

The representatives and (or) the president of the Alberhill Clay Workers Union be notified of the decision of acceptance or refusal reached by the Los Angeles Brick and Clay Products Company by twelve o'clock mid-night of Thursday the

tenth day of June Nineteen hundred and Thirty-seven and in the existence of no notification by the specified hour the Union shall act upon the supposition that their requests have been denied and will not be complied with

EDWARD E. HANNUM
President
LAURENCE C. McNUTT
Sec & Treas.

State of California,
County of Los Angeles.—ss.

Henry Prussing, being first duly sworn, deposes and says: That he is the secretary-treasurer of Los Angeles Brick and Clay Products Company, a corporation, respondent in the above entitled proceedings, and that he makes this verification for and on behalf of said respondent corporation; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters that are therein stated upon his information or belief, and as to those matters he believes it to be true.

HENRY PRUSSING

Subscribed and sworn to before me this 15 day of December, 1937.

[Seal] MANYA NIDEVER
Notary Public in and for the said County and State

[Title of Board and Cause.]

NOTICE OF SPECIAL APPEARANCE OF LOS ANGELES BRICK & CLAY PRODUCTS COMPANY, A CORPORATION, AND MOTION TO DISMISS COMPLAINT

To: The National Labor Relations Board of the United States of America, Twenty-first Region, and Towne Nylander, Regional Director thereof, and Alberhill Clay Products Workers' Union No. 373:

You and each of you will kindly take notice that the respondent, Los Angeles Brick & Clay Products Company, a corporation, hereby appears in the above entitled proceeding, specially only and not generally, but only for the purpose of contesting and questioning the jurisdiction of the National Labor Relations Board of the United States of America to entertain or hear or otherwise proceed in connection with the complaint on file herein.

You will please take further notice that on the 16th day of December, 1937, at 9:30 A. M. on that day, or as soon thereafter as counsel can be heard, in the Board of Supervisors meeting room, Riverside County Courthouse, Riverside, California, said respondent, Los Angeles Brick & Clay Products Company, a corporation, will move the above entitled Board for an order dismissing said complaint and all proceedings thereon upon the grounds that said respondent has not during any time mentioned in said complaint, or within two years last past

been, nor is it now engaged in any operations, the interruption of which would have the effect of burdening or obstructing the free flow of commerce among the several states, territories of the United States, or with foreign countries, and upon the further ground that the alleged activities of respondent as set forth in the complaint herein have not a close, intimate or substantial relation to, or effect upon, trade, traffic or commerce among the several states, territories of the United States, or with foreign countries, or have led or tended to lead to labor disputes, burdening or obstructing commerce or the free flow of commerce, within the meaning of the National Labor Relations Act and within the meaning of Article I, Section 8 and the 10th amendment to the Constitution of the United States.

Said motion will be based upon the affidavit of Henry Prussing hereto attached, upon all the files, records and minutes of this proceeding, and upon other evidence, both oral and documentary, to be adduced at the hearing of said motion.

ELLIS, HOWLETT & MacLAREN
By ELMER H. HOWLETT
Attorneys for Respondent.

Memorandum of Points and Authorities

National Labor Relations Board vs. Jones & Laughlin Steel Corporation (United States Supreme Court, No. 419, Mar. 12, 1937) 57 S. Ct. 615;

Schechter Corporation vs. United States. 295 U.S. 495.

[Title of Board and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Henry Prussing being first duly sworn deposes and says: That he is now and for many years last past has been an officer, to-wit, Secretary of the Los Angeles Brick & Clay Products Company, a corporation, respondent in the above entitled proceedings; that as such officer he is now and for many years last past has been familiar with the business and affairs of respondent, and has had and does now have the custody of the books and records of respondent, and is familiar with the contents thereof.

That affiant has examined the records of the corporation and from such examination states that during the year 1936, and during the year 1937 from January to November thereof inclusive, not to exceed Ten Percent (10%) of the products manufactured and produced by respondent have been sold and transported in interstate commerce from its plants in the State of California, to, into and through the states of the United States, other than the State of California, or territories of the United States, or foreign countries, and that all of the materials used by respondent in the manufacture of its products in the State of California are purchased or obtained by respondent entirely within the State of California.

Affiant further states that respondent during the last two fiscal years has not distributed, circulated or published any advertisements or circulars describing respondent's products, or soliciting sales of respondent's products without the State of California; that the only advertisements published by respondent during said period have been advertisements in the "Southwest Builder & Contractor", a trade publication published, printed and circulated within the State of California.

HENRY PRUSSING.

Subscribed and sworn to before me this 15th day of December, 1937.

[Seal] E. H. HOWLETT,

Notary Public in and for the County of Los Angeles, State of California.

[Title of Board and Cause.]

ORDER DESIGNATING TRIAL EXAMINER

A charge having been filed in this matter, and it having appeared to the Regional Director of the 21st Region that a proceeding in respect thereto should be instituted, and the Board having considered the matter and being advised in the premises,

It is hereby ordered that Dwight Stephenson act as Trial Examiner in the above case in place and stead of Clifford D. O'Brien and perform all the duties and exercise all the powers granted to trial

examiners under the Rules and Regulations—Series 1, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., December 16, 1937.

By direction of the Board:

[Seal] GEORGE O. PRATT,
Chief Trial Examiner

[Title of Board and Cause.]

INTERMEDIATE REPORT

Upon amended charges duly made and acting pursuant to authority of Section 10(b) of the National Labor Relations Act (herein called "the Act"), 49 U. S. Stat. 449, Towne Nylander, Regional Director for the Twenty-first Region, agent of the National Labor Relations Board (herein called "the Board"), acting pursuant to Article IV, Section 1 of its Rules and Regulations—Series 1, as amended, issued its Complaint December 9, 1937, against Los Angeles Brick & Clay Products Company, a corporation, respondent herein. The Complaint and Notice of Hearing thereon were duly served upon the respondent, upon Alberhill Clay Products Workers Union No. 373 (herein called "the Union"), the Central Labor Council, of Los Angeles, and upon Los Angeles Industrial Union Council, on December 9, 1937, in accordance with Article V, Section 1 of said Rules and Regulations.

With respect to unfair labor practices, the Complaint alleges in substance:

1. That respondent, on or about June 2, 1937, and on various succeeding dates, to and including the 10th day of June 1937, discharged, in the aggregate, thirteen of its employees for joining and assisting the Union and engaging in concerted activities, and for the same reason has refused to reinstate said employees.

2. That respondent, on or about the 25th day of June, 1937, for the same reasons, refused, and at all times since that date has refused, to re-employ and reinstate fourteen other of its employees, who had been on strike.

3. That respondent, on or about the 25th day of June 1937 did reinstate two of its employees who had been on said strike, to-wit: Sam Dabich and Nils Martensen, but for the reasons above stated did reduce their respective pay and assigned them to jobs other than those previously held by said Sam Dabich and Nils Martensen.

4. That respondent, on or about June 10, 1937, and at all times thereafter, refused to bargain with said Union, which Union had been designated by a majority of respondent's employees as their representative for the purpose of collective bargaining.

5. That the aforesaid acts of respondent constitute unfair labor practices affecting commerce within the meaning of Section 8, Subdivisions (1), (3),

and (5), and Section 2, Subdivisions (6) and (7) of said Act.

Thereafter respondent filed its Answer to the Complaint, in which it alleged that in the course of the conduct of its business respondent sold and transported not to exceed 10 per cent of its products in interstate commerce and that the balance was sold in the State of California; and that it purchased all of its raw materials within the State of California. The Answer denied that it discriminated against or discharged or refused to reinstate any employees or reduced the pay of any of them or altered the terms and conditions of the employment of any of them for the reason that said employees or any of them joined or assisted in union activities. The Answer further denied that said Union was the representative of a majority of respondent's employees or any unit thereof or that respondent had ever refused to bargain collectively within the meaning of or as required by the provisions of the Act.

Pursuant to the notice of hearing, the undersigned, as Trial Examiner of the Board, designated to conduct the hearing in this case, conducted a hearing in Riverside, California, on December 16, 17, 20, 21, 22, and 30, 1937, and on January 10, 1938, in Los Angeles, California.

Full opportunity to be heard, to cross-examine witnesses, and to produce evidence bearing upon the issues was afforded to each of the parties. The

parties were granted a reasonable period for oral argument at the close of the hearing and were afforded an opportunity to file briefs. Neither party desired or offered to argue the case or to file briefs.

Respondent, prior to filing its Answer, filed a Notice of Special Appearance and a Motion to Dismiss the Complaint for lack of Jurisdiction on the part of the Board. The motion was denied. On motion of counsel for the Board, the Complaint was dismissed without prejudice as to the alleged unfair labor practices in so far as the following employees of respondent were concerned, to-wit: C. W. Starr, Albert (Slim) Davis, Chas. Willard, Claude Pearl, Raymond Macht, Kenneth Norris, Chas. Bland, Nils Martenson, Juan Romero, Ernest Sill, and Mark Damron.

Upon the record as thus made, the stenographic report of the hearing, and all the evidence, including oral testimony, documentary and other evidence received in the hearing, the undersigned makes, in addition to the above, the following specific findings of fact:

FINDINGS OF FACT

I

Business of the Respondent

Los Angeles Brick & Clay Products Company is a California corporation organized January 10, 1900. Its principal plant is located in Alberhill, California, and it has approximately 140 employees at said plant. It is engaged in the manufacture,

sale, and distribution of face, fire, common, and paving brick, hollow, floor, drain, and roofing tile, sewer pipe, and flue lining. It also has a plant in the City of Los Angeles, and other property, none of which is involved in this hearing. The principal raw materials used in the manufacture of its products are clay and certain chemicals. All of said raw materials are either procured by respondent in the State of California or purchased from concerns maintaining places of business in said State.

The total volume of its sales for the year 1936 and from January to November 1937, both inclusive, amounted to approximately $970,000. Of said sales, approximately $131,000 in value were either by the respondent or its purchasers shipped outside the State of California. For either or both intrastate and interstate shipments, the respondent uses 13 different truck carriers and 5 different railroad carriers.

II

The Union

Alberhill Clay Products Workers Union, No. 373, holds a charter from International Union of Mine, Mill, and Smelter Workers, which is affiliated with the Committee for Industrial Organization. It admits to membership all employees of respondent engaged in the pits and in the production department of the plant, exclusive of clerical and supervisory employees, and is a labor organization within the meaning of Section 2, subdivision (5) of the Act.

III

The Unfair Labor Practices

A. Organizational Efforts of the Union

The first attempt by the Union to organize the employees began in the latter part of May 1937, the first meeting being held on June 1, 1937. Notices announcing said meeting had been freely distributed among respondent's employees. Approximately 45 of the respondent's employees who attended that meeting applied for membership in the proposed Union. Several supervisory employees also attended the meeting and observed.

A second meeting was held on June 5, 1937, at which meeting the Union voted to apply for a charter, and elected the following officers, to-wit: Edward Hannum, president; Louis Juarez, vice-president; Lawrence C. McNutt, secretary and treasurer; and Mark Damron, doorman.

The next meeting was held on June 9, 1937, at which meeting it was decided to request the respondent to recognize the Union as the exclusive bargaining agency for its said employees. It was also decided to request the respondent to re-employ and put back to work those employees whose services were terminated subsequent to June 1, 1937, and then, if the work at the plant did not warrant full time for all employees, that all such employees be given equal number of hours of work each month and that all overtime, consisting of time over 8 hours per day and 40 hours per week, be paid for at the

rate of time-and-a-half. It was further voted to strike should said requests meet with refusal.

B. The Refusal to Bargain Collectively

The above-mentioned requests and notice of intention to strike should respondent fail to comply therewith, were incorporated in a written document, which document was delivered to the respondent on the morning of June 10, 1937. On said date, the Union comprised approximately 112 employees of the respondent engaged in the pits and in the production department of the plant at Alberhill, exclusive of clerical and supervisory employees.

The respondent failed to reply to the said requests of the Union, and the members thereof on the morning of June 11, 1937, went out on strike and established a picket line at the respondent's said plant.

On June 14, 1937, the Union again by letter requested respondent to recognize it as collective bargaining agent for the said employees. No reply to this letter was received by the Union.

Subsequently, and while the strike was still on, representatives of the Union and representatives of the respondent met in the offices of the Regional Director of the Board at Los Angeles, California, in an attempt to settle their differences, but they were unable to do so.

The employees of the respondent engaged in the pits and in the production department of the plant at Alberhill, exclusive of clerical and supervisory

employees, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

A majority of said employees had designated Alberhill Clay Products Workers Union, No. 373, a labor organization as defined in the National Labor Relations Act, as their representative for the purpose of collective bargaining with respondent in respect to rates of pay, wages, hours of employment, and other conditions of employment. On June 9, 1937, and at all times since, Alberhill Clay Products Workers Union, No. 373, was and has been, by virtue of Section 9 (a) of said Act, the exclusive bargaining representative of all employees in such unit for the purpose of collective bargaining with the respondent in respect to rates of pay, wages, hours of employment, and other conditions of employment.

The Alberhill Clay Products Workers Union, No. 373, has attempted on June 10 and 16, 1937 to bargain with respondent, as exclusive representative of respondent's said pit and production employees in respect to rates of pay, wages, hours of employment, and other conditions of employment.

The respondent has at all times since June 10, 1937, refused to bargain collectively with Alberhill Clay Products Workers Union, No. 373, as exclusive representative of respondent's said pit and production employees in respect to rates of pay, wages,

hours of employment and other conditions of employment.

C. The Lay-Offs

The complaint alleges the discriminatory discharge and refusal to re-employ a number of named individuals. The respondent denies that the discharges and subsequent failure to re-employ were because of union activities.

All of the employees hereinafter named were either known to the respondent to be engaged in organizing the Union or were observed in the picket line by the executive and supervisory employees of respondent.

The strike terminated on June 25, 1937, and the evening before the Union addressed a letter to the respondent requesting that certain employees, including those hereinafter named, be re-employed in order of their seniority. Requests for re-employment were also made in person by a number of the employees. The circumstances surrounding the lay-offs of each individual employee will be taken up in order, as follows:

1. Lawrence McNutt

Lawrence McNutt commenced working for the respondent January 6, 1937, and continued until June 3, 1937, when he was laid off by respondent. The reason indicated by respondent was a sharp decline of business and the lack of orders on hand.

Mr. McNutt attended the first meeting and the subsequent meetings of the Union, and was elected

as its Secretary and Treasurer. At the time of his lay-off, he was receiving wages in the amount of 47½ cents per hour and had received two raises. On June 25, 1937, he applied for reinstatement and was refused.

There was some testimony that Mr. McNutt was physically too small properly to perform his duties. However, it is significant that he was selected to be laid off one day after the first indication of his union activities which were known to the supervisory employees of respondent.

I find that Lawrence McNutt was selected for lay-off by respondent on June 3, 1937, and has since been refused employment by respondent for the reason that said Lawrence McNutt joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

2. Edward E. Hannum.

Edward E. Hannum commenced working for respondent in June, 1935, and was laid off on June 7, 1937. He had been elected President of the local Union. At the time of his lay-off, he was receiving 47½ cents per hour. He applied for reinstatement on June 25, 1937, but was refused. No complaints had ever been made in regard to his work, and he was given a letter of recommendation by respondent.

I find that said Edward E. Hannum was laid off by the respondent on June 7, 1937, and has since

been refused employment by respondent for the reason that he joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

3. Sylvester Osborne

Sylvester Osborne commenced working for respondent in September, 1936, and went out on strike June 11, 1937. He attended the first two meetings of the Union and signed an application for membership at the first meeting. At the time he went out on strike he was receiving 47½ cents per hour. He applied for reinstatement on June 25, 1937, and two times subsequent thereto, but was refused. No complaints had ever been made in regard to his work and he was given a letter of recommendation by respondent.

I find that Sylvester Osborne went out on strike on June 11, 1937, and has since been refused employment by respondent for the reason that he joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

4. Lester Hazelton

Lester Hazelton commenced working for respondent some time in December 1929, and was laid off June 3, 1937. At that time he was receiving a wage of 52½ cents an hour. He had received a number of raises, and when he applied for reinstatement

on June 25, 1937, was refused, but was given a recommendation. He had, prior to his lay-off, been active in the Union.

I find that Lester Hazelton was selected for lay-off by respondent on June 3, 1937, and has since been refused employment by respondent for the reason that said Lester Hazelton joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

5. Henry Boontjer

Henry Boontjer[1] commenced working for respondent on the 8th day of April 1937. Prior to June 8, when he was laid off, he had received one raise, which brought his wages to 42½ cents per hour. He applied for reinstatement with respondent about the middle of July, but was refused. He joined the Union at the meeting on June 5.

I find that Henry Boontjer was selected for lay-off by respondent on June 8, 1937, and has since been refused employment by respondent for the reason that said Henry Boontjer joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in con-

---

(1) On motion of counsel for the Board at the hearing, the complaint was amended to include the charge that Henry Boontjer had been discharged because of Union activities.

certed activities for the purpose of collective bargaining and other mutual aid and protection.

6. Thomas A. Roddy

Thomas A. Roddy commenced working for respondent January 1, 1937. He joined the Union at the meeting on June 1, and was laid off June 3. At the time of his lay-off, he was receiving 47½ cents per hour. He applied for reinstatement on June 25, 1937, and three times subsequent thereto, but was refused.

I find that Thomas A. Roddy was selected for layoff by respondent on June 3, 1937, and since has been refused employment by respondent for the reason that said Thomas A. Roddy joined and assisted a labor organization known as Alberhill Clay Products Workers Union No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

7. Gregorio Cordero

Gregorio Cordero commenced working for respondent April 17, 1937. He joined the Union at the meeting of June 1, and was laid off June 3. He was re-employed some weeks after the termination of the strike, on production of proof that he did not participate therein. He then continued working for about a month and a half, when he was discharged. Just before his discharge, he got into several fist fights with fellow employees and also made threats against his foreman.

I find that the discharge of Gregorio Cordero was not because of any union activities on his part.

8. William G. Ashworth

William G. Ashworth commenced working for respondent October 8, 1935; he joined the Union at the meeting of June 1, and was very active thereafter in its affairs. On June 8, he was laid off. He applied for reinstatement on June 25, 1937, but was refused. At the time of his lay-off he was receiving 50 cents per hour. He received from respondent a letter of recommendation.

I find that William G. Ashworth was selected for lay-off by respondent on June 8, 1937, and has since been refused employment by respondent for the reason that said William G. Ashworth joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

9. Lawrence H. German

Lawrence H. German commenced working for respondent about January 27, 1937. He joined the Union at the meeting of June 1, and was laid off on June 9. He applied for reinstatement on June 25, 1937, and two times subsequent thereto, but was refused. At the time of his lay-off he was receiving 52½ cents per hour.

I find that Lawrence H. German was selected for lay-off by respondent on June 9, 1937, and

has since been refused employment by respondent for the reason that said Lawrence H. German joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

10. Chester W. Lucas

Chester W. Lucas commenced working for respondent about July 1, 1935. He joined the Union at the meeting of June 1, and was very active thereafter in its affairs. On June 11, 1937, he went out on strike, and when the strike terminated, he applied for reinstatement on June 25, 1937, and two times thereafter, but was refused. At the time he went out on strike, he was receiving 62½ cents per hour.

I find that Chester W. Lucas went out on strike on June 11, 1937, and has since been refused employment by respondent for the reason that he joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

11. Arnold Moss

Arnold Moss commenced working for respondent April 13, 1937; he joined the Union on June 2, and was laid off on June 3. He applied for reinstatement on June 25, 1937, and several times subsequent thereto, but was refused.

I find that Arnold Moss was selected for lay-off by respondent on June 3, 1937, and has since been refused employment by respondent for the reason that said Arnold Moss joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

12. James Grier

James Grier commenced working for respondent in January 1934. He joined the Union on June 5, 1937, and was laid off June 10th. He applied for reinstatement on June 25, 1937, and several times subsequent thereto, but was refused. At the time of his lay-off he was receiving 50½ cents per hour.

I find that James Grier was selected for lay-off by respondent on June 10, 1937, and has since been refused employment by respondent for the reason that said James Grier joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

13. Frank German

Frank German commenced working for the respondent August 21, 1936. He joined the Union on June 1, 1937, and went out on strike June 11. After the strike ended and on June 25, 1937, he

applied for reinstatement, but was refused. At the time he went out on strike he was receiving 50½ cents per hour.

I find that Frank German went out on strike on June 11, 1937, and has since been refused employment by respondent for the reason that he joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

14. Art Hannum

Art Hannum commenced working for respondent in February 1937, and went out on strike June 11, 1937. Some few days thereafter he joined the Union. He applied for reinstatement on June 25, 1937, but was refused. He now has a much better job and does not desire to be reinstated.

I find that Art Hannum went out on strike on June 11, 1937, and has since been refused employment by respondent for the reason that he joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

Further that said Art Hannum has secured other regular and substantially equivalent employment.

15. Gerald Wenker

Gerald Wenker commenced working for the respondent in June 1936. He joined the Union on June 1, 1937, and was laid off on June 3. On June 25, 1937, he applied for reinstatement, but was re-

fused. At the time he was laid off, he was receiving 47½ cents per hour.

I find that Gerald Wenker was selected for layoff by respondent on June 3, 1937, and has since been refused employment by respondent for the reason that said Gerald Wenker joined and assisted a labor organization known as Alberhill Clay Products Workers Union, No. 373, and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

16. Glenn C. Stewart

Glenn C. Stewart commenced working for the respondent in December 1934; he joined the Union on June 5, 1937, and went out on strike June 11. On June 25, 1937, he applied for reinstatement, but was refused. At the time he went out on strike, he was receiving 52½ cents per hour.

I find that Glenn C. Stewart went out on strike on June 11, 1937, and has since been refused employment by respondent for the reason that he joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

17. M. J. Eaglin and M. G. Eaglin

M. J. Eaglin and M. G. Eaglin were employed by respondent in February 1937, and their employment terminated at the time of the strike, June 11, 1937. They each joined the Union on June 4, 1937. Neither man was present to testify at the hearing,

nor was any evidence introduced as to the reason for the termination of their employment. No evidence was introduced that they ever applied to respondent for re-employment. The record shows that on July 8, 1937, they were both given transportation to Nebraska by the State Relief Administration. The complaint should be dismissed as to M. J. and M. G. Eaglin.

18. Sam Dabich

Sam Dabich commenced working for the respondent in January, 1926. He joined the Union on June 1, 1937, and went out on strike June 11. At the time he went out on strike he was taking care of certain machinery, and was receiving a wage of 50½ cents per hour. After the strike terminated on June 25, 1937, he applied to Plant Superintendent for reinstatement, but was refused. Later he applied to the General Manager, who re-employed him on or about July 7, 1937. When he went back to work, the Plant Superintendent told him that he was starting in like a new man, and put him to work setting brick for one of the kilns at a wage of 47½ cents per hour. He is satisfied with his present work and wages.

I find that respondent did, on or about July 7, 1937, reinstate Sam Dabich, but did deprive him of rights and privileges previously enjoyed by him, and did reduce his rate of pay and wages and did assign him to a job other than the job which he had held prior to June 11, 1937.

I further find that respondent deprived the said Sam Dabich of rights and privileges previously enjoyed by him and reduced his rate of pay and wages, and assigned him to a job other than the job which he had held prior to June 11, 1937, for the reason that he joined and assisted the Union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

IV

Effect of Unfair Labor Practices Upon Commerce

Upon the whole record, the undersigned finds that the activities of respondent set forth in Section III above, occurring in connection with the operations of respondent set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and have led, and tend to lead, to labor disputes burdening commerce and the free flow of commerce.

CONCLUSIONS AND RECOMMENDATIONS

Upon the basis of the foregoing Findings of Fact, the undersigned hereby determines and concludes:

1. Respondent, by its lay-off and refusal to reinstate William G. Ashworth, Thomas A. Roddy, Arnold Moss, James Grier, Gerald Wenker, Lester Hazelton, Lawrence H. German, Lawrence McNutt, Edward E. Hannum, and Henry Boontjer; by its

refusal to reinstate Chester W. Lucas, Sylvester Osborne, Frank German, Glenn C. Stewart, and Art Hannum; by its deprivation of the rights and privileges previously enjoyed by Sam Dabich, and by its reduction of his rate of pay and wages; and by its refusal to bargain collectively with Alberhill Clay Products Workers Union, No. 373; by all of said acts has discouraged membership in the labor organization known as Alberhill Clay Products Workers Union, No. 373; and by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as set forth in the above Findings of Fact, has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8, Subdivision (1), and Section 2, Subdivisions (6) and (7) of the National Labor Relations Act.

2. Respondent, by its lay-off and refusal to reinstate William G. Ashworth, Thomas A. Roddy, Arnold Moss, James Grier, Gerald Wenker, Lester Hazelton, Lawrence H. German, Lawrence McNutt, Edward E. Hannum, and Henry Boontjer; by its refusal to reinstate Chester W. Lucas, Sylvester Osborne, Frank German, Glenn C. Stewart, and Art Hannum; and by its deprivation of the rights and privileges previously enjoyed by Sam Dabich, and by its reduction of his rate of pay and wages, as set forth in the above Findings of Fact, has engaged in, and is engaging in unfair labor practices affect-

ing commerce within the meaning of Section 8, Subdivision (3), and Section 2, Subdivisions (6) and (7) of the National Labor Relations Act.

3. Respondent, by its refusal to bargain collectively with Alberhill Clay Products Workers Union, No. 373, as set forth in the above Findings of Fact, has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8, Subdivision (5) of the National Labor Relations Act.

Wherefore, the undersigned recommends that:

1. Respondent cease and desist from interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Respondent cease and desist from refusing to bargain collectively with Alberhill Clay Products Workers Union, No. 373, the representative of its employees engaged in the pits and in the production department of its plant at Alberhill, California, exclusive of supervisory and clerical employees.

3. In order to effectuate the policies of the Act, take the following affirmative action:

a. Respondent, upon request, bargain collectively with the Alberhill Clay Products Workers Union, No. 373, as the exclusive representative of its em-

ployees engaged in the pit and in the production department of its plant at Alberhill, California, exclusive of supervisory and clerical employees, in respect to rates of pay, wages, hours of employment and other conditions of employment.

b. Offer to Lawrence McNutt, Edward E. Hannum, Sylvester Osborne, Lester Hazelton, Henry Boontjer, Thomas A. Roddy, William G. Ashworth, Lawrence H. German, Arnold Moss, James Grier, Frank German, Gerald Wenker, and Glenn C. Stewart, immediate and full reinstatement to their former positions, without prejudice whatsoever to any of their rights and privileges.

c. Make whole said Lawrence McNutt, Edward E. Hannum, Lester Hazelton, Henry Boontjer, Thomas A. Roddy, William G. Ashworth, Lawrence H. German, Arnold Moss, James Grier, and Gerald Wenker, for any loss of pay any of them has suffered by reason of his lay-off, by payment to him of a sum equal to that which he would have normally earned as wages during the period from the date of his lay-off to the date of the aforesaid offer of reinstatement, less the amount earned by him during such period.

d. Make whole said Sylvester Osborne, Frank German, and Glenn C. Stewart, for any loss of pay any of them has suffered by reason of his going out on strike, by payment to him of a sum equal to that which he would normally have earned as wages dur-

ing the period from the date he applied for reinstatement and was refused, to the date of the aforesaid offer of reinstatement, less the amount earned by him during such period.

e. Post immediately notice to its employees in at least three conspicuous places in respondent's plant, stating: (1) that the respondent will cease and desist in the manner aforesaid; (2) that respondent's employees are free to join or to assist in any labor organization for the purpose of collective bargaining with respondent; (3) that respondent will not discharge or in any manner discriminate against members of Alberhill Clay Products Workers Union No. 373, or any other labor organization of its employees or any person assisting such organization, by reason of such membership or such assistance.

f. That said notice remain posted for a period of at least thirty consecutive days from date of posting.

g. File with the Regional Director of the Twenty-First Region, on or before ten days from the service of this Report upon respondent, a report in writing setting forth in detail the manner and form in which it has complied with the foregoing requirements.

It is further recommended that unless on or before ten days from the date of service of this Report upon respondent, respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the matter be referred forthwith to the National Labor Relations Board,

and that said Board issue an Order requiring the respondent to take the action aforesaid.

Dated: April 30, 1937.

S/ DWIGHT STEPHENSON
Trial Examiner.

Copy

NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

J. Warren Madden, Chairman
Edwin S. Smith
Donald Wakefield Smith

September 22, 1938

Ellis, Howlett & MacLaren
649 South Olive Street
Los Angeles, California

Gentlemen:

Re: L. A. Brick &
Clay Products Co., Case No. C-584

This is to advise you that regardless of previous notification or rulings by the Board or the Trial Examiner in the above-entitled matter, you are hereby granted the right, within ten days from the receipt of this letter, to apply for oral argument or permission to file briefs.

Yours very truly,
NATHAN WITT,
Secretary.

Copy to:

Mr. Lawrence C. McNutty, Secretary, Alberhill Clay
Products Workers' Union #373,
Twin Springs,
Corona, California.

L. A. Brick & Clay Products Co.,
Alberhill, California.

United States of America
Before the National Labor Relations Board

In the Matter of

LOS ANGELES BRICK & CLAY PRODUCTS CO. and
ALBERHILL CLAY PRODUCTS WORKERS' UNION NO. 373

Case No. C-584

Decided February 27, 1939

Brick and Clay Products Manufacturing Industry—Interference, Restraint, and Coercion: refusal to bargain collectively; discriminations in regard to hire and tenure of employment—Unit Appropriate for Collective Bargaining; no controversy; all employees of respondent at its Alberhill plant, including the pits, excluding foremen, supervisors, and office employees—Representatives: proof of choice: membership application cards; no controversy—Collective Bargaining: employer's duty during strike;

refusal of request by Regional Director; ignoring union's request for conference to negotiate agreement—Strike: prolonged by unfair labor practices —Discrimination: refusal to reinstate strikers: delayed reinstatements; hiring of new employees; charges of, in regard to terms and conditions of employment, dismissed as to one employee—Reinstatement Ordered: 15 strikers named in complaint, as amended, and upon application, 21 other strikers not named, dismissing employees hired since initial refusal to bargain, if necessary; preferential list—Back Pay: awarded; employees refused reinstatement; from September 1, 1937, date when substantially normal operations were resumed, until date of offer of reinstatement or placement on preferential list.

Mr. Frank A. Mauritsen, **for the Board.**

Ellis, Howlett & MacLaren, by Mr. E. H. Howlett and Mr. Towson T. MacLaren, of Los Angeles, Calif., for the respondent.

Mr. William Gateley, of Los Angeles, Calif., for the Union.

Mr. David Y. Campbell, of counsel to the Board.

DECISION
and
ORDER

Statement of the Case

Upon charges and amended charges duly filed by Alberhill Clay Products Workers' Union No. 373, herein called the Union, the National Labor Rela-

tions Board, herein called the Board, by Towne Nylander, Regional Director for the Twenty-first Region (Los Angeles, California), issued its complaint dated December 9, 1937, against Los Angeles Brick & Clay Products Co., Alberhill, California, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance, (a) that on various dates between June 2 and June 10, 1937, the respondent discharged 13 employees[1] and at all times thereafter refused to reinstate them, for the reason that they joined and assisted the Union (b) that on or about June 25 and at all times thereafter the respondent refused to reinstate certain other named employees,[2] 16 in number, for the reason that they

---

1 The names of these employees are: William Ashworth, Albert Davis, Lawrence German, James Grier, Edward Hannum, Lester Hazelton, L. McNutt, Arnold Moss, Claude Pearl, Thomas Roddy, C. Starr, Gerald Wenker, Charles Willard.

2 The names of these employees are: Charles Bland, Gregorio Cordero, Sam Dabich, Mark Damron, M. G. Eaglin, M. J. Eaglin, Frank German, Art Hannum, C. Lucas, Raymond Macht, Nils Martinson, Kenneth Norris, Sylvester Osborne, Juan Romero, Ernest Sill, Glenn Stewart.

joined and assisted the Union; (c) that on or about June 25 the respondent reinstated Sam Dabich and Nils Martinson but deprived them of all rights and privileges previously enjoyed by them, reduced their rates of pay and wages and assigned them to work different from their former positions, for the reason that they joined and assisted the Union; (d) that on or about June 10 and at all times thereafter the respondent refused to bargain collectively with the Union as the representative of its employees in an appropriate unit, although the Union has been designated by a majority of employees therein as their representatives; (e) that by the afore-mentioned acts, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The respondent, in its answer filed at the hearing, denied that it was engaged in or that its business affected interstate commerce, and denied the allegations of the complaint as to the unfair labor practices.

Pursuant to an amended notice, a hearing was held on December 16, 17, 20, 21, and 22, 1937 at Riverside, California, and on December 30, 1937, and January 10, 1938, at Los Angeles, California, before Dwight Stephenson, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and participated in the hearing. The Union was represented by its international organizer and likewise partici-

pated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the hearing the respondent moved to dismiss the complaint on the ground that the Board had no jurisdiction of the subject matter. This motion was denied by the Trial Examiner at the conclusion of the hearing. On the first day of the hearing counsel for the Board moved to amend the complaint to include the name of Henry Boontjer among the names of employees alleged to have been discriminated against. This motion was allowed by the Trial Examiner. The hearing continued for 6 days thereafter, over a period of some 25 days, and the issues raised by the amendment are substantially the same as those which existed under the original complaint. The trial Examiner's ruling is hereby affirmed.[3] Counsel for the Board also moved to dismiss the allegations of the complaint as to 11 named persons[4] on the ground that they had failed to appear at the hear-

3 Cf. National Labor Relations Board v. American Potash and Chemical Corporation, 98 F. (2d) 488 (C. C. A. 9th). See also Matter of McKaig-Hatch, Inc. and Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local No. 1139, 10 N. L. R. B., No. 4.

4 The names of these persons are as follows: Charles Bland, Mark Damron, Albert Davis, Raymond Macht, Nils Martinson, Kenneth Norris, Claude Pearl, Juan Romero, C. Starr, Ernest Sill, Charles Willard.

ing. This motion was allowed by the Trial Examiner. The Trial Examiner made various rulings on other motions of the parties, and on objections to the admission of evidence. The Board has reviewed all the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On April 30, the Trial Examiner issued his Intermediate Report, which was filed with the Regional Director and duly served upon all the parties, finding that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act. He recommended that the respondent cease and desist from its unfair labor practices; reinstate, with back pay, certain of its employees found to have been discriminated against in regard to hire and tenure of employment;[5] upon request, bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit; and take certain other appropriate action to remedy the situation brought about by the respondent's unfair labor practices. The Trial Examiner also recommended dismissal of the complaint, as amended, as to M. G. and M. J. Faglin on the ground that they had failed to appear and

5 The names of these employees are: William Ashworth, Henry Boontjer, Frank German, Lawrence German, James Grier, Edward Hannum, Lester Hazleton, Lawrence McNutt, Arnold Moss, Sylvester Osborne, Thomas Roddy, Glenn Stewart, Ger-

testify at the hearing.[6] On May 11, the Union filed exceptions to the Intermediate Report. These exceptions deal with certain omissions from the Trial Examiner's conclusions and recommendations therein, above noted.[7] On May 31 the respondent filed its exceptions. The parties, although accorded an opportunity for oral argument before the Board, made no request therefor. We have considered both the respondent's and the Union's exceptions to the Intermediate Report, and in so far as they are inconsistent with the findings, conclusions and Order below, find them to be without merit.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I.

The Business of the Respondent

The respondent, Los Angeles Brick & Clay Products Co., is a California corporation engaged in the

---

ald Wenker. While the Trial Examiner also found Chester Lucas and Art Hannum were similarly discriminated against, their names were omitted from his recommendations. No recommendation was made with respect to Sam Dabich, whom the Trial Examiner found to have been discriminated against as to terms and conditions of employment.

6 There was no recommendation as to the dismissal of Gregorio Cordero's name from the complaint, although the Trial Examiner failed to find that he has been discriminated against.

7 See footnote 5, supra. The errors are evidently typographical.

business of manufacturing, selling, and distributing brick, tile, sewer pipe, and flue lining. Its plant is located at Alberhill, Riverside County, and its principal office is located at Los Angeles, both in the State of California. The respondent employs approximately 150 persons at the plant. All of its raw materials are procured from sources in California.

The respondent's gross annual sales amount to about $500,000. During the first 11 months of 1937, its total net sales of finished products amounted to $463,671. Of this amount the respondent sold and delivered to points outside California products valued at $32,149. The respondent further sold and delivered products valued at $40,771 to purchasers for intended shipment outside California, such intention being set forth on the purchase orders. About $13,425 worth of finished products also were sold and delivered to railroads for intended shipment outside California during the same period. Thus, during the period under consideration, approximately 18.6 per cent. of the respondent's finished products, amounting to about $86,345 in value, were sold for shipment or shipped by the respondent to destinations outside California.

II.

The Organization Involved

Alberhill Clay Products Workers' Union No. 373 is a labor organization chartered by International Union of Mine, Mill and Smelter Workers, affiliated

with the Committee for Industrial Organization. It admits to membership all employees of the respondent except foremen, supervisory employees, and clerical employees.

III.

The Unfair Labor Practices

A. The Respondent's attitude toward the union

The Union began its organizational activities with a meeting of the respondent's employees on June 1, 1937. About 50 to 70 of the respondent's employees attended, of whom 33 signed application cards for membership. During the ensuing week the Union formed its internal organization and within a short time thereafter, over 60 per cent of the respondent's employees joined the Union. The respondent knew in advance that the meeting of June 1 was to be held. According to the testimony of Baer, the foreman, he, Bodine, the plant superintendent, and Mills and Gantz, also foremen, were present at the meeting for at least 45 minutes, during which time a substantial number of employees signed application cards. Baer admitted that he recognized about 20 of his subordinates at the meeting. Baer testified that "we attended to merely see . . . what was going on and what the activity was."

On June 2 Gantz discussed the Union during the entire noon hour with Ashworth, one of the employees under Gantz. Gantz stated to Ashworth that the employees should renounce outside affila-

tions and form their own union. Gantz further told Ashworth that the employees were "fools" to allow themselves to be led by a man such as Green, the union organizer. Later the same day Gantz came to the kiln where Ashworth and McNutt, another employee, were working and remarked, "You fellows are fools to affiliate with the C. I. O. or any outside organization. You should form a union, yourselves, and stay clear of all outside affilations." Gantz admitted that he had seen McNutt at the union meeting the evening before. On June 8, following Ashworth's lay-off, Gantz again remarked to Ashworth, "The mistake you fellows made from the start was joining up with any outside organization whatever. You should have just formed an employees' union here in this one plant and stayed clear of all outside affilations." Gantz's denial that he made the foregoing statements fails to convince us in view of the clear testimony of both Ashworth and McNutt.

Several weeks prior to the Union's first efforts to organize the respondent's employees, Bodine approached Hazleton, an employee, and, advising him that efforts would probably be made to unionize the plant, said, "In case the union comes in here, there won't be [any] chance for a bonus this coming year like there was last year . . . Spread [the word] around over the yard among the boys there." Hazleton did not carry out Bodine's instructions.

Bodine admitted having told Hazleton that he anticipated union activity among the employees, but denied that he made any statement concerning payment of the bonus. The record, however, shows that Bodine played a prominent part in the respondent's acts of opposition toward the Union. We do not believe his testimony with respect to the Hazleton conversation.

It is apparent from the above-described conduct of its supervisory employees that the respondent was opposed to the union organization of its employees. Its hostility toward the Union affords a significant background for our consideration of its activities which constituted the unfair labor practices alleged in the complaint, as amended.

B. The refusal to bargain collectively

1. The appropriate unit

The complaint alleges that the appropriate unit consists of all employees of the respondent in the pits and in the production department of the plant, excluding foremen, supervisors, and office employees. Such employees are eligible for membership in the Union and may properly constitute an industrial bargaining unit. The respondent does not question the propriety of this unit.

We find that all the employees of the respondent at its Alberhill plant, including the pits, excluding foremen, supervisors, and office employees, constitute a unit appropriate for the purposes of collective bargaining and that said unit insures to em-

ployees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Union of the majority in the appropriate unit

The respondent employed approximately 164 persons[8] in the appropriate unit on June 10, 1937. Of these, 108[9] employees had signed application cards for membership in the Union on or before June 10. From June 11 to 14, inclusive, 10 additional employees in the appropriate unit signed such application cards. The authenticity of these 118 application cards, which were introduced in evidence, was not disputed by the respondent.

We find that on June 10, 1937, and at all times thereafter, the Union was the duly designated representative of a majority of the employees in a unit appropriate for collective bargaining, and pursuant to Section 9 (a) of the Act, was the exclusive representative of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

---

8 This figure includes the 43 employees who were temporarily laid off previous to June 10. See Matter of Kuehne Manufacturing Company and Local No. 1791, United Brotherhood of Carpenters and Joiners of America, 7 N. L. R. B. 304, 323.

9 Ray Mains is shown on Respondent Exhibit No. 1 as having joined on June 18. An examination of Mains' application card, however, convinces us that the correct date is June 10.

3. The refusal to bargain

As stated above, the Union began organizational activities with a meeting of the respondent's employees on June 1. A substantial number of employees joined the Union in the presence of Bodine, Baer and Gantz. Several days before, a general wage increase had been announced by the respondent, effective June 1. On June 2, in the morning, the respondent announced a reduction in force, stating that it was for economy reasons. By June 9, 43 employees were laid off, including a substantial number of union members. On that day, perturbed by the lay-offs, the Union held a meeting to formulate bargaining requests.

On June 10, at about 7:30 a. m., a committee of the Union composed of the respondent's employees, presented to Bodine a memorandum setting forth demands: (a) that the respondent recognize the Union as the bargaining agent of its employees; (b) that all employees laid off since June 1 be reinstated by the following morning and that all employees be given an equal number of hours of work; and (c) that all time worked in excess of 8 hours per day or 40 hours per week be paid for at the rate of one and one-half times the regular rate of pay. The memorandum granted the respondent until midnight of the same day to signify acceptance or refusal of the demands, and concluded with the statement that "in the existence of no notification by the specified hour the Union shall act upon the

supposition that their requests have been denied and will not be complied with." A copy of the demands was also delivered to the respondent's office in Los Angeles. Bodine turned over the memorandum to Larson, the respondent's general superintendent, upon the latter's arrival at the plant at about 10 a. m.

At about 3:45 p. m. Bodine approached Lucas, a member of the Union's committee, and told him that the respondent would take no action upon the Union's requests; that the Union had nothing to back it up in its demands; and that the respondent would ignore the request. We are unable to accept Bodine's denial of this version of the conversation. We have found above that Bodine's credibility is in doubt. We see no reason to accord his testimony greater weight here. No further word was received from the respondent by the Union. Early the following morning all but six of the employees struck in accordance with a previous vote taken by the Union. A picket line was formed and maintained throughout the strike. Shortly after the formation of the picket line Baer, one of the foremen, remarked to Arthur Hannum, a striker, that if the employees had formed a "company union in there or the A. F. of L. . . . Mr. Larson would have come around and talked business," but that Larson did not like the policies of the C. I. O. Hannum's testimony with respect to this statement was not controverted by Baer, who was called as a witness for the respondent.

During the strike Larson met with officials of the Union in the office of the Regional Director, at the latter's request, to discuss the June 10 requests and a proposed settlement of the strike. McNutt, the secretary-treasurer of the Union, testified that the Regional Director asked Larson whether or not the respondent would bargain with the Union; that Larson replied he "would never have a union in [his] plant if [he] had to close it down for good." Larson admitted that he made no response to the request to bargain with the Union.

Larson, however, denied the testimony of McNutt and further testified as follows: that on June 15 he (Larson) saw Nylander, the Regional Director, and Howard, the Chief Field Examiner, in Nylander's office; that both Nylander and Howard assured Larson that the strike was illegal and that they would endeavor to have the strike called off; that he (Larson) had two subsequent conferences with Nylander and Howard; that he had a fourth and last conference with Nylander on June 23 or 24, which was the meeting referred to by McNutt. Larson later testified, however, that one of the conferences with Nylander was held after the termination of the strike, on or about June 28.

Other evidence clearly establishes that the conference referred to by McNutt took place on June 15 and not on June 23 or 24, as Larson testified. The contradictions in Larson's testimony and his admission that he made no response to the request

to bargain with the Union cast doubt upon his credibility as a witness. We find that on June 15, 1937, Larson made the statement to which McNutt testified.

On June 16 the respondent commenced to rehire employees. Fifty-nine striking employees were rehired while the strike was still in progress. On the same day McNutt, as secretary-treasurer of the Union, in a letter to the respondent, made the following request:

> As the representatives of your employees * * * selected by your employees to bargain collectively for them we herewith request that you advise us within three days of a time and place for a meeting to negotiate an agreement.

The respondent did not reply to the Union's request and the strike continued until June 25, when the union members met on the picket line and voted to terminate the strike. The same day McNutt, in his official capacity, again wrote to the respondent, and requested the reemployment in order of seniority of the Union's members named on an attached list. The respondent, however, ignored this request and on June 28 it began to hire new employees.

The respondent's principal defense is that the June 10 demands of the Union set an unreasonable limit of time in which the respondent might accept or reject them; that neither Bodine nor Larson had authority to act on the demands; and that before

the respondent had an opportunity to act the strike was called. Without passing upon the validity of this defense with reference to the respondent's action prior to the strike, it is clear that it does not justify the refusal of the respondent to bargain subsequent to June 11. The existence of the strike did not relieve the respondent of its statutory duty to bargain collectively with the representatives of its employees.[10]

The respondent's further argument that Larson did not know how to communicate with the Union after the employees were on strike does not bear inspection. Larson met with the Union's officials on June 15 and was then asked to bargain with the Union. Furthermore, the record is devoid of evidence that Larson ever attempted to bring the matter before the respondent's board of directors, with whom the authority to act on the Union's request is alleged to have rested. The record yields a strong inference that the respondent gave the Union's proposal no serious consideration and we conclude that Bodine accurately stated the respondent's position, that it "would ignore the request."

---

10 Cf. Matter of Jeffery-DeWitt Insulator Company and Local 455, United Brick and Clay Workers of America, 1 N. L. R. B. 618, 625, order enforced in Jeffery-DeWitt Insulator Company v. National Labor Relations Board, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; Matter of Kuehne Manufacturing Company and Local No. 1791, United Brotherhood of Carpenters and Joiners of America, 7 N. L. R. B. 304.

The respondent further contends that the Union offered no proof that it had been designated by a majority of the respondent's employees as their representative for collective bargaining. That the Union represented a majority of the employees during the strike was obvious, nor did the respondent question the Union's status as such representative. The picket line furnished tangible evidence to support the Union's position. Further proof was never requested by the respondent.

We need not determine whether the June 10 memorandum technically constituted a request to the respondent to bargain collectively with the Union. Such request clearly was made at the June 15 conference, which was called to discuss the Union's demands and to arrive at terms for the settlement of the strike. Larson's expression of unalterable opposition toward the Union made such discussion futile and collective bargaining impossible. By ignoring the Union's further request on June 16 for an appointment to negotiate an agreement, the respondent continued its policy of refusing to bargain collectively with the Union and continued to obstruct the possible settlement of the strike.

We find that the respondent, on June 15, 1937, and at all times thereafter, refused to bargain collectively with the Union as the representative of its employees in the appropriate unit in respect to rates of pay, wages, hours of employment, and other

conditions of employment; and that by such acts the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act. We further find that the respondent, by its refusal to bargain collectively with the Union, caused a prolongation of the strike.

C. The lay-offs, the refusals to reinstate, and the delayed reinstatements

The complaint, as amended, alleges that the respondent discriminatorily discharged certain named employees prior to the strike and thereafter refused reinstatement to them and to others of the strikers because of their union membership and activity. The record does not establish that the discharges or lay-offs were discriminations as to hire or tenure of employment contrary to Section 8 (3) of the Act. There remains the question of whether or not the respondent committed unfair labor practices by refusing to reinstate certain of the strikers.

Following the termination of the strike on June 25 an application was made by the Union to the respondent to reinstate in order of seniority 118 named striking employees. Some 36 of the strikers, including 4 employees not named in the application, have not been reinstated. William Ashworth, Henry Boontjer, Frank German, Lawrence German, James Grier, Arthur Hannum, Edward Hannum, Lester Hazleton, Chester Lucas, Lawrence McNutt, Arnold Moss, Sylvester Osborne, Thomas Roddy, Glenn

Stewart, and Gerald Wenker are among the employees who have not been reinstated. Their names were included in the June 25 application for reinstatement. All but Wenker and Hazleton also applied in person to Bodine for reinstatement after the strike.

The respondent contends generally that it decreased its volume of production after the strike and consequently reduced its personnel. It appears from the record, however, that on June 25 the respondent had 66 employees on its pay roll; on June 30, there were 101. On August 31 there were 153 employees on the pay roll. On the other hand, on June 1 there were 148 employees working. On June 2, the day the lay-offs commenced, 155 employees were working. Further, it is admitted that the respondent had resumed substantially normal operations by about the first of September. From June 25, the date when the strikers applied for reinstatement, through August 31, the respondent hired 30 new employees.

It is clear that the respondent could have reinstated by September 1 all but 2 of the 32 strikers who had applied for reinstatement. Nevertheless, the respondent failed to take back any of the 32 strikers who applied for reinstatement, including the 15 named above. The validity of the respondent's contention extends, therefore, only so far as the respondent may show by credible evidence that all or any of the 15 employees named in the com-

plaint, as amended, were not reinstated for cause to those positions for which new employees were hired. We will discuss below the respondent's evidence in this respect.

Moreover, the record, in two particulars, supports the conclusion that the reason for the respondent's refusal to take back the 15 strikers named above was their activity in and support of the Union. In the first place many of the more active members of the Union were included among those not reinstated. Thus Edward Hannum was president of the Union; McNutt was the secretary-treasurer. McNutt and Ashworth, as we have set forth above in discussing the respondent's anti-union attitude, were berated by their foremen as "damn fools to join the C. I. O." Lucas and Stewart were on the committee which presented the Union's first demands to Bodine on June 10. Lucas accompanied McNutt and Edward Hannum to the June 15 conference with Larson to settle the strike.

In the second place the circumstances surrounding the denial of reinstatement to the strikers here involved reveal clearly the respondent's attitude. Stewart was refused reinstatement by Bodine on June 25 because Stewart "got off on the wrong foot." Osborne was told by Bodine to look elsewhere for a job, Bodine adding, "You boys will be careful what you sign after this." Bodine denied having made such statements. The testimony of Osborne and Stewart concerning Bodine's refusals to rein-

state them substantially accords with the testimony of other employees who testified. We are convinced that here, too, Bodine is not to be credited. Bodine told others who applied on June 25 and during the remaining 4 working days in June that the respondent would hire no more employees since all that were needed had been reemployed; that "it would be favorable for you boys to forget" the respondent. Bodine's remark to Osborne clearly related the refusal to reinstate Osborne with his signing an application card for membership in the Union. Bodine's statement to Stewart, and his advice to striking employees "to forget" the respondent, can have but one meaning: that as to them Bodine regarded their union activity as a bar to their employment by the respondent.

In the light of these circumstances we turn to a consideration of the specific reasons alleged by the respondent for its failure to reinstate each of the strikers named above.

McNutt, Ashworth, and Boontjer were employed as kiln drawers under Gantz. Ashworth was a crew leader. He received 50 cents per hour; McNutt, 47½ cents per hour; and Boontjer, 42½ cents per hour. The work requires no special training or skill. The respondent contends that Ashworth and McNutt were too light to perform the duties of their jobs. Both had received raises during the course of their employment and no question as to the competency of any of the three men appears to have been raised

during the period of their employment prior to the strike.

The respondent further contends that Ashworth was not rehired after the strike because his work was being handled by other employees; that Boontjer was not qualified for the general labor jobs available; and that McNutt was qualified for a better job than any that were available. The respondent offers no explanation, however, as to why, with the plant operating at substantially normal capacity by September 1, their former or substantially equivalent positions could not have been made available to these employees.

The reasons assigned for the failure to reinstate Ashworth, McNutt, and Boontjer lack plausibility.

Frank German and Grier were employed as truck drivers, for which each was paid 50½ cents per hour. Both had previously worked at various jobs in the plant as general laborers. Both were active in the picket line.

The respondent contends that German was not reinstated because only general labor jobs were available. As in the case of McNutt, Ashworth and Boontjer, however, the respondent gives no reason why, with the plant operating at substantially normal capacity, it could not have restored German to his former or a similar position.

It is admitted that Grier was replaced by a new employee. The respondent contends, however, that Grier was discharged prior to the strike for ineffi-

ciency. Grier was given letters of recommendation during the strike by both Bodine and Mills, the foreman, attesting to Grier's competency. We find from other evidence that Grier was laid off due to the reduction in force prior to the strike. The respondent admits that employees so laid off prior to the strike retained their status as employees.[11]

We are unable to credit the respondent's contentions as to its alleged reasons for not reinstating Grier and German.

Moss, Roddy, and Osborne were employed as general laborers. Roddy and Osborne each received 47½ cents per hour; Moss' earnings do not appear. Moss and Roddy were on the picket line. Bodine testified that a new man was hired in place of Moss "because of the nature of the work." No further explanation was given. Bodine also testified that Osborne's former position is still vacant and that he was not reinstated "because of the nature of the work we had to offer him." This is inconsistent with Bodine's statement that German was not reinstated because "we didn't have any job other than laborer." Bodine further testified that Roddy was not reinstated "because of inefficiency, and I would say stupid, not quick to receive instructions, and so forth." Bodine, however, admitted on cross-examination:

---

[11]Matter of Kuehne Manufacturing Company, footnote 8, supra.

Q. Well, now, let us get this clear about Mr. Roddy. Was his work satisfactory?

A. As far as I know, his work was satisfactory.

We find that the reasons assigned by Bodine for the failure to reinstate Moss, Osborne, and Roddy are equally unsatisfactory.

Lawrence German and Lucas received 52½ cents and 62½ cents per hour, respectively, as mechanics on the general maintenance crew. German and Lucas are the only members of the crew who have not been reinstated. The evidence indicates that one new employee was hired and one employee was transferred to work on the crew after the strike. This is not specifically denied by the respondent, although Bodine testified that the position formerly occupied by Lucas has not been filled. Although the record does not disclose whether or not the two new employees added to the crew were hired as mechanics, it is not shown that German and Lucas were unqualified to fill these positions.

Stewart was leverman on the steam press, for which he was paid 52½ cents per hour. No explanation is offered by the respondent as to why Stewart was not reinstated.

The respondent contends that Wenker's former position is not steady. Wenker was employed as regular transfer man at 47½ cents per hour, for 8 months prior to the strike. The work of a transfer man is a regular part of production. The respond-

ent's contention as to Wenker is contrary to the evidence.

The respondent alleges that Edward Hannum's former position on the dry press is still vacant due to decreased volume of production. Hannum also had worked in various capacities during his 2 years of employment. There is considerable interchange of jobs and classifications. No reason is advanced why Hannum was not offered reinstatement to one of the positions filled by new employees. Hannum received 47½ cents per hour.

Hazleton was employed for 7½ years. At the time of the strike he loaded and inspected sewer pipe, for which he was paid 52½ cents per hour. It was Hazleton whom Bodine sought to use as an agent to forestall the formation of the Union. Hazleton's failure to do Bodine's bidding showed the respondent where Hazleton's sympathies lay with reference to self-organization and collective bargaining. Bodine testified that he did not reinstate Hazleton because he believed that for Hazleton to work at a lesser rate of pay than he had received "would probably be humiliating" for Hazleton. Bodine did not explain why Hazleton's rate of pay would have been decreased. It does not appear that Hazleton's former position was abolished, nor is it shown that his work was assigned to other employees after the strike. The respondent's further contention that Hazleton was inefficient does not appear to be urged seriously, nor is it supported by the evidence.

We think that no credible reason has been advanced by the respondent for not taking back Hazleton.

Arthur Hannum remained on duty as burner on the tunnel kiln after the strike commenced, until he was relieved by Baer. Baer admitted that the kiln was in satisfactory condition; that he was qualified to tend the kiln; and that he thanked Hannum for not leaving the kiln unattended, so as to prevent damage. Hannum's conduct in leaving his post to join other employees on strike offers no cause for refusing him reinstatement.

Hannum applied to Bodine in person on June 25 for reinstatement. Bodine replied that the operation of the tunnel kiln was discontinued, and indicated that the discontinuance was permanent. Operation of the kiln was recommenced in early August and was being continued at the date of the hearing. Bodine testified that Hannum was not reinstated because Hannum had left the vicinity prior to the resumption of the kiln's operation. He admitted, however, that he did not intend to reinstate Hannum to his former position as burner because Hannum had been guilty of sleeping while on duty. It appears that a burner's duties require close attention to prevent damage to the kiln. The respondent does not assert that the incident was a ground for refusing Hannum's reinstatement to other work which new employees were hired to perform between June 25 and July 14, when he left the vicinity. Hannum

had previously been employed by the respondent as a laborer.

Furthermore, Hannum was neither discharged nor disciplined for his offense. He was asleep for 10 minutes and no damage was caused. According to the respondent's evidence Hannum continued working as a burner until the strike, some 12 days later. Larson testified that he discussed with Baer the replacement of Hannum, and that the strike occurred before a new burner had been selected. Larson later testified, however, that Hannum was not replaced because the kiln was to be closed in 15 or 18 days and it was not desired to "break in" a burner for that length of time. Baer, although called as a witness, did not testify regarding the discussions with Larson. We find elsewhere that Larson is not a credible witness. Because of the inconsistency in his testimony we do not accord it weight here. We conclude that the respondent regarded Hannum's dereliction as minor; that the gravity now asserted for the incident is an afterthought. The respondent's alleged reason for not having reinstated Hannum prior to the hiring of new employees must be rejected.

On June 11, the last day he worked, Hannum received 47½ cents per hour. Since July 14 he has been employed elsewhere at higher wages. The record does not establish, however, that he has received substantially equivalent employment.

The respondent contends that the fact that other members of the Union have been reinstated shows the absence of discrimination. Such result was inevitable unless the respondent replaced all members of the Union with new employees; in such case the fact of discrimination would have required no further proof. The respondent's contention provides no answer to the replacement of some of the strikers by new employees.

The respondent admits that it knew that strikers were available for reemployment at the time it hired new employees. In attempted explanation for its refusal to take back strikers, the respondent contends that it could not reasonably be expected to assume the burden of soliciting employees to return to work. The respondent's position rests either upon the false premise that the strikers made no attempt to return to work after the termination of the strike or upon the equally fallacious proposition that the strikers, by virtue of the strike, lost their status as employees. The contrary of the latter proposition is too well settled to require discussion, and, moreover, is admitted in the record.

The strike, if not provoked by the respondent's unfair labor practices, was certainly prolonged by its unfair labor practice in refusing to bargain collectively with the Union. The strikers thus remained employees of the respondent within the meaning of the Act and were entitled to reinstatement to their former or substantially equivalent positions upon ap-

plication therefor.[12] such application for reinstatement was made by the Union, as well as by most of the employees individually, at the termination of the strike. Inasmuch as the plant was operating at approximately normal capacity by September 1, the respondent could have reinstated all but two of the strikers, who had signified a desire to return, to their former or substantially equivalent positions. The respondent, however, while refusing to reinstate the strikers here involved, employed 30 new employees within the first few weeks after the end of the strike. The respondent has failed to show, in the case of any of the strikers named above, any plausible reason for its failure to reinstate him or for its giving preference to the new employees. On the other hand, the evidence shows affirmatively that the strikers in question were denied reinstatement because of their union membership and activity. Our conclusion in this respect is confirmed by the respondent's treatment of Cordero and Dabich, considered below.

We find that the respondent has discriminated in regard to the hire and tenure of employment of William Ashworth, Henry Boontjer, Frank German, Lawrence German, James Grier, Arthur Hannum, Edward Hannum, Lester Hazleton, Chester

---

[12]See Matter of Black Diamond Steamship Corporation and Marine Engineers' Beneficial Association, Local No. 33, 3 N. L. R. B. 84, order enforced in Black Diamond Steamship Corporation v. National Labor Relations Board, 94 F. (2d) 975 (C. C. A. 2d), certiorari denied, 304 U. S. 579.

Lucas, Lawrence McNutt, Arnold Moss, Sylvester Osborne, Thomas Roddy, Glenn Stewart, and Gerald Wenker, thereby discouraging membership in the Union; that it thereby has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.[13]

In addition to the allegations with respect to the foregoing employees, the complaint alleged that the respondent had discriminated in regard to the hire and tenure of employment of Gregorio Cordero and Sam Dabich in refusing their reinstatement after their application on June 25. Cordero and Dabich were reinstated on July 7. The names of both employees appeared on the list submitted by the Union to the respondent on June 25, above mentioned. Cordero was among the employees laid off temporarily prior to the strike.[14] Dabich went on strike with other members of the Union and was active in the picket line.

Cordero applied personally to Bodine for reinstatement on or about July 1, without immediate success. Cordero testified that Bodine told him to return in a few days; that he returned as instructed,

---

[13]See Matter of Western Felt Work and Textile Workers Organizing Committee, Western Felt Local, 10 N. L. R. B., No. 31.

[14]We already have pointed out that such employees retained their status as employees of the respondent during and subsequent to the strike. See footnote 11, supra.

and was refused reinstatement; that Bodine said that he had reports that Cordero "was making a lot of trouble in the case of the Union" and that he would not reinstate Cordero for that reason; that he then brought Bodine a letter to prove that he was not active in the strike, but had been temporarily employed elsewhere; that thereupon Bodine reinstated him.

Bodine denied making the remarks which Cordero testified occasioned the production of the letter, or that the letter was in any way connected with the later decision to reinstate Cordero. Bodine further testified that during the strike he learned that persons residing in the "company camp" had complained to the deputy sheriff of being disturbed by Cordero's loud talking at night; that Cordero's reinstatement was delayed because of the reported complaints; that Cordero denied making any disturbance; and that several days later Bodine decided that Cordero "was worthy of re-hiring." Bodine admitted that he made no investigation of the alleged complaints, nor was there evidence introduced to show that complaints actually were made. We have heretofore found that Bodine's testimony in several instances is not worthy of belief. We do not attach greater credibility to it here. We find that Cordero's testimony accurately portrays the circumstances leading up to his reinstatement.

We are equally satisfied that the asserted ground for the delay in reinstating Cordero did not exist.

The nature of the offense with which he stood charged had no bearing on Cordero's qualifications as an employee. Such qualifications were, in effect, admitted by Bodine. There is, moreover, doubtful fortuity in Bodine's sudden abandonment of his refusal to reinstate Cordero, following the production of proof that Cordero did not actively participate in the strike. We think that Cordero correctly interpreted Bodine's remarks as calling for such proof.

Dabich, likewise, was first refused reinstatement by Bodine. The respondent has assigned no reason for such refusal. Dabich had been employed for 11½ years. Dabich subsequently saw Larson and said, "Maybe we made a mistake. How's chances to go back to work?" Larson replied that Dabich could return to work the next day. Although Larson testified several times at the hearing, he failed to deny Dabich's testimony. By making "a mistake" Dabich clearly had reference to the employees' efforts toward self-organization, and we have no doubt that Larson so understood the remark. Bodine has charge of all hiring. Larson's unexplained reversal of Bodine's refusal to reinstate Dabich, following as it did Dabich's virtual renunciation of the Union, can be interpreted in the light of the record only as evidence of a policy adopted by the respondent not to rehire employees who would continue actively to support the Union.

Our reasoning and conclusions set forth above in connection with the respondent's refusals to rein-

state the 15 strikers first named are equally applicable to the refusals to reinstate Cordero and Dabich. We find that both Cordero and Dabich were initially denied reinstatement, and that their reinstatement was delayed, because they joined and assisted the Union. We further find that Cordero and Dabich were reinstated on July 7 upon assurances to the respondent that Cordero had not been active in the strike and that Dabich was willing to capitulate to the respondent's opposition to the Union. While the evidence does not show the specific jobs which were available for Cordero and Dabich when their reinstatement was first refused, we conclude, as in the cases of the 15 strikers named above, in the absence of a showing to the contrary, that they were qualified for positions which new employees were hired to fill between June 25, the date of the written application, and July 7, the date that Cordero and Dabich were reinstated. Our conclusion in this regard is supported by the fact that Cordero and Dabich were subsequently reinstated, to jobs different from their former positions, for no other reason than that the respondent became convinced that neither employee would menace its objective to defeat the Union.

The record does not support the allegation of the complaint that Dabich was discriminated against in regard to his terms and conditions of employment.

We find that the respondent has discriminated in regard to the hire and tenure of employment of

Gregorio Cordero and Sam Dabich, thereby discouraging membership in the Union; that it thereby has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

We find that the respondent has not discriminated against Sam Dabich in respect to terms and conditions of his employment.

IV.

The Effect of the Unfair Labor Practices Upon Commerce

We find that the activities of the respondent set forth in Section III B and C above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

The respondent will be required to cease and desist from its unfair labor practices specified above, and to take such action, hereinafter set forth, essential to effectuate the purposes and policy of the Act.

Thirty-six of the employees who were on strike have not been reinstated. We have found that 15

of these, named in Appendix "A," attached hereto and made a part hereof, were discriminated against in respect to their hire and tenure of employment contrary to Section 8 (3) of the Act. For this reason and, independently thereof, for the reason that the strike was prolonged by the respondent's unfair labor practices in refusing to bargain collectively with the Union, we shall, in accordance with our usual custom, order the respondent to offer them immediate reinstatement to their former or substantially equivalent positions.[15] In addition, for the latter reason, the respondent will be required, upon application, to offer reinstatement to the remaining 21 striking employees who have not been reinstated. The offers of reinstatement shall be without prejudice to seniority and other rights and privileges.

The reinstatement of the 36 employees shall be effected in the following manner: All new employees hired after June 15 shall, if necessary to provide employment for those to be offered reinstatement, be dismissed. If, thereupon, by reason of a reduction in force there is not sufficient employment immediately available for those to be offered reinstatement, all available positions shall be distributed among the remaining employees in accordance with the respondent's usual method of reducing its force, without discrimination against any employee because of his union affiliation or activities, following

---

[15]Matter of Jeffery-DeWitt Insulator Company, footnote 10, supra.

a system of seniority to such extent as has heretofore been applied in the conduct of the respondent's business. Those employees remaining after such distribution, for whom no employment is immediately available, shall be placed upon a preferential list prepared in accordance with the principles set forth in the previous sentence, and shall thereafter, in accordance with such list, be offered employment in their former or in substantially equivalent positions, as such employment becomes available and before other persons are hired for such work.

The respondent will, in addition, be required to make whole each of the 15 employees named in Appendix "A" for any loss of pay each may have suffered by reason of the respondent's discrimination against him, less his net earnings[16] during the

---

[16]By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for the unlawful refusal to reinstate him and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers, Local No. 2590, 8 N. L. R. B., No. 51. Monies, received by an employee for work performed upon Federal, State, county, municipal, or other relief projects during the period from September 1, 1937, to the date of the offer of reinstatement, are earnings. We will order the respondent to deduct such amounts from the sums otherwise due the employees and to pay such deductions over to the appropriate fiscal

period for which said sum is computed. Since we are unable to find from the record the specific dates on which each of the 15 employees named in Appendix "A," together with Cordero and Dabich, would have been reinstated but for the discrimination, we will order that back pay be computed from September 1, 1937, the date on which substantially normal operations were resumed, until the date of the offer of reinstatement to each. Inasmuch as both Cordero and Dabich were reinstated prior to September 1, neither will be entitled to receive back pay.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. Alberhill Clay Products Workers' Union No. 373 is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All employees of the respondent at its Alberhill plant, including the pits, excluding foremen, supervisors, and office employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Alberhill Clay Products Workers' Union No.

---

agency of the Federal, State, county, municipal or other government or governments which supplied the funds for the work relief project. See Matter of Republic Steel Corporation and Steel Workers Organizing Committee, 9 N. L. R. B., No. 33. See also, Matter of Western Felt Works, footnote 13, supra.

373 was on June 10, 1937, and at all times thereafter has been, the exclusive representative of all such employees for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with the Union on June 15, 1937, and at all times thereafter, as the exclusive representative of its employees in an appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of William Ashworth, Henry Boontjer, Frank German, Lawrence German, James Grier, Arthur Hannum, Edward Hannum, Lester Hazleton, Chester Lucas, Lawrence McNutt, Arnold Moss, Sylvester Osborne, Thomas Roddy, Glenn Stewart, Gerald Wenker, Gregorio Cordero, and Sam Dabich, and thereby discouraging membership in the Union, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

8. The respondent has not discriminated, and is not discriminating in regard to terms or conditions of employment of Sam Dabich, within the meaning of Section 8 (3) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Los Angeles Brick & Clay Products Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act;

(b) Refusing to bargain collectively with Alberhill Clay Products Workers' Union No. 373 as the exclusive representative of its employees at the Alberhill plant, including the pits, excluding foremen, supervisors, and office employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(c) Discouraging membership in the Union or any other labor organization of its employees, by

discriminating in regard to hire and tenure of employment because of membership in or activity on behalf of the Union or any other labor organization.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act;

(a) Offer to those employees listed in Appendix "A," and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section entitled "Remedy" above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(b) Make whole the 15 employees named in Appendix "A" for any loss of pay each may have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to each of them, respectively, of a sum of money equal to the amount each normally would have earned as wages from September 1, 1937, to the date of the offer of reinstatement, less his net earnings during said period; deducting, however, from the amount otherwise due each said employee, monies received by him during said period for work performed upon Federal, State, county, municipal or other work relief projects, and pay over the amounts so deducted to the appropriate fiscal agency

of the Federal, State, county, municipal, or other government or governments which supplied the funds for said projects;

(c) Upon application, offer to those employees, who were on strike on June 15, 1937, and thereafter, and who are not named in Appendix "A," and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in the section entitled "Remedy" above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section; and thereafter, in said manner, offer them employment as it becomes available;

(d) Make whole the employees ordered in paragraph (c) above to be offered reinstatement for any loss of pay they will have suffered by reason of the respondent's refusal to reinstate them, upon application, following the issuance of this Order, by payment to each of them, respectively, of a sum of money equal to that which each normally would have earned as wages during the period from 5 days after the date of such application for reinstatement to the date of the offer of employment or placement upon the preferential list required by paragraph (c) above, less his net earnings during said period; deducting, however, from the amount otherwise due each said employee, monies received by him during said period for work performed upon Federal, State,

county, municipal or other work relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said projects;

(e) Post immediately, and keep posted for a period of at least sixty (60) consecutive days from the date of posting, notices in conspicuous places in and about the plant, including the yard and the pits, stating in both English and Spanish that the respondent will cease and desist in the manner set forth in 1 (a), (b), and (c), and that it will take the affirmative action set forth in 2 (a), (b), (c), (d), and (e), of this Order; and

(f) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

And it is further ordered that the complaint, in so far as it alleges that the respondent discriminated in regard to the terms and conditions of employment of Sam Dabich, be, and the same hereby is dismissed.

APPENDIX A

William Ashworth
Henry Boontjer
Frank German
Lawrence German
James Grier
Arthur Hannum
Edward Hannum
Lester Hazleton
Chester Lucas
Lawrence McNutt
Arnold Moss
Sylvester Osborne
Thomas Roddy
Glenn Stewart
Gerald Wenker

Case No. C-584

In the Matter of

LOS ANGELES BRICK & CLAY PRODUCTS CO.

and

ALBERHILL CLAY PRODUCTS WORKERS' UNION No. 373

AFFIDAVIT AS TO SERVICE

District of Columbia, ss:

I, George Lo Verde, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of

said Board in Washington, D. C.; that on the 27th day of February, 1939, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision and Order to the following named persons, addressed to them at the following addresses:

Alberhill Clay Products Workers' Union No. 373, c/o Mr. William G. Ashworth, Acting Secretary, P. O. Box 198, Alberhill, California.

Ellis, Howlett & MacLaren, 649 South Olive St., Los Angeles, California.

International Union of Mine, Mill and Smelter Workers, 720 Colorado Building, Denver, Colo.

GEORGE LO VERDE.

Subscribed and sworn to before me this 27th day of February, 1939.

(Seal) JOHN O. NEVIN.

Notary Public, D. C.

My commission expires Aug. 15, 1943.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

ELLIS, HOWLETT & MacLAREN,

(Signature or name of addressee)

M. NIDEVER.

(Signature of addressee's agent)

Date of delivery March 1, 1939.

U. S. Government Printing Office

Form 3811 **c 5—6116**

Penalty for Private Use to Avoid Payment of Postage, $300.

Postmark of Delivering Office

[Postmarked Los Angeles, Calif., March 1, 1939.]

Post Office Department

Official Business

Registered Article

No. 69960

Insured Parcel

No...

Return to National Labor Relations Board

(Name of Sender)

Street and Number or Post Office Box.................................

Washington, D. C.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

WM. G. ASHWORTH,

(Signature or name of addressee)

....

(Signature of addressee's agent)

Date of delivery March 1, 1939.

U. S. Government Printing Office

Form 3811 c 5—6116

Penalty for Private Use to Avoid Payment of Postage, $300.

Postmark of Delivering Office

[Postmarked Alberhill, Calif., March 2, 1939.]

Post Office Department

Official Business

Registered Article

No. 69959

Insured Parcel

No...

Return to National Labor Relations Board

(Name of Sender)

Street and Number, or Post Office Box, ...

Washington, D. C.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9218

October Term, 1938

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a Corporation,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U.S.C. § 151 et seq.), respectfully petitions this Court for the enforcement of an order issued by it against respondent, Los Angeles Brick & Clay Products Co., a corporation, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Los Angeles Brick & Clay Products Co. and Alberhill Clay Products Workers' Union No. 373, Case No. C-584."

In support of this petition, the Board respectfully shows:

(1) Respondent is a California corporation, engaged in business in the State of California, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, and including, without limitation, a complaint, answer, hearing for the purpose of taking testimony and receiving other evidence, trial examiner's report and exceptions filed thereto, the Board, on February 27, 1939, duly stated its findings of fact and conclusions of law and issued an order, so

much of which as relates to this proceeding being as follows:

ORDER

Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Los Angeles Brick & Clay Products Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act;

(b) Refusing to bargain collectively with Alberhill Clay Products Workers' Union No. 373 as the exclusive representative of its employees at the Alberhill plant, including the pits, excluding foremen, supervisors, and office employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(c) Discouraging membership in the Union or any other labor organization of its em-

ployees, by discriminating in regard to hire and tenure of employment because of membership in or activity on behalf of the Union or any other labor organization.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to those employees listed in Appendix "A," and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section entitled "Remedy" above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(b) Make whole the 15 employees named in Appendix "A" for any loss of pay each may have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to each of them, respectively of a sum of money equal to the amount each normally would have earned as wages from September 1, 1937, to the date of the offer of reinstatement, less his net earnings during said period; deducting, however, from the amount otherwise due each said employee, moneys received by him during said period for work per-

formed upon Federal, State, county, municipal or other work relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said projects;

(c) Upon application, offer to those employees, who were on strike on June 15, 1937, and thereafter, and who are not named in Appendix "A," and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in the section entitled "Remedy" above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section; and thereafter, in said manner, offer them employment as it becomes available;

(d) Make whole the employees ordered in paragraph (c) above to be offered reinstatement for any loss of pay they will have suffered by reason of the respondent's refusal to reinstate them, upon application, following the issuance of this Order, by payment to each of them, respectively, of a sum of money equal to that which each normally would have earned as wages during the period from 5 days after the date of such application for reinstatement to the date of the offer of employment or place-

ment upon the preferential list required by paragraph (c) above, less his net earnings during said period; deducting, however, from the amount otherwise due each said employee, monies received by him during said period for work performed upon Federal, State, county, municipal or other work relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said projects;

(e) Post immediately and keep posted for a period of at least sixty (60) consecutive days from the date of posting, notices in conspicuous places in and about the plant, including the yard and the pits, stating in both English and Spanish that the respondent will cease and desist in the manner set forth in 1(a), (b), and (c), and that it will take the affirmative action set forth in 2(a), (b), (c), (d), and (e), of this Order; and

(f) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

* * * * * * * *

APPENDIX "A"

William Ashworth
Henry Boontjer
Frank German
Lawrence German
James Grier
Arthur Hannum
Edward Hannum
Lester Hazleton
Chester Lucas
Lawrence McNutt
Arnold Moss
Sylvester Osborne
Thomas Roddy
Glenn Stewart
Gerald Wenker

(3) On February 27, 1939, the Board's decision and order were served upon respondent by sending a copy thereof postpaid, bearing Govern-frank, by registered mail, to Ellis, Howlett & MacLaren, its attorneys, in Los Angeles, California.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and

transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon, set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board and requiring respondent, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD
By ROBERT B. WATTS,
Associate General Counsel

Dated at Washington, D. C., this 21st day of June, 1939.

District of Columbia, ss:

Robert B. Watts, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

ROBERT B. WATTS

Subscribed and sworn to before me this 21st day of June, 1939.

(Seal) JOHN E. LAWYER

Notary Public, District of Columbia.

My commission expires Sept. 8, 1939.

[Endorsed]: Filed June 26, 1939. Paul P. O'Brien, Clerk.

[Title of Board and Cause.]

TESTIMONY.

Mr. Mauritsen: Mr. Examiner, at this time I should like to file in evidence the formal papers filed in this case to date, with the request that they be numbered Board's Exhibit No. 1, with the following subdivisions: [2*]

Exhibit 1-A, the charge filed by the Union.

1-B, the amended charge filed December 5th.

1-C, the complaint and notice of hearing.

1-D, the affidavit of service of the complaint and notice of hearing.

1-E, various registered return receipts.

1-F, the affidavit of service of the subpoena duces tecum.

1-G, the amended notice of hearing.

1-H, the affidavit of service of the subpoena duces tecum upon Henry Prussing.

1-J, We will leave 1-J for the motion of the Respondent for an extension of time to answer.

Mr. Howlett: That is to be filed.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Trial Examiner Stephenson: Can't that be noted at this time and later be put in the file?

Mr. Mauritsen: Yes; just reserve the number and it can be filed later, and also,

1-K, the order of the Regional Examiner.

1-L, the notice of special appearance of L. A. Clay & Brick Products Company, a corporation, and a motion to dismiss complaint.

1-M, the answer.

1-N, We will leave that number for the order designating the Trial Examiner.

That is with the understanding that these additional [3] papers will be filed when they are received, as part of Exhibit 1.

Trial Examiner Stephenson: Any objection, gentlemen?

Mr. Howlett: No objection.

Trial Examiner Stephenson: If not, they will be received in evidence and marked as Board's Exhibit 1.

(Thereupon the documents above referred to were marked as Board's Exhibit 1 and received in evidence.)

Mr. Mauritsen: Now, at this time it has been agreed between counsel that the evidence regarding jurisdiction in this matter will be taken at a later date, so that we will proceed with the other parts of the complaint at this time.

Mr. Howlett: Without the waiver of the question of jurisdiction.

Trial Examiner Stephenson: All right; and the Examiner, of course, will reserve his ruling on the

motion to dismiss for want of jurisdiction until after all the jurisdictional facts are in.

Mr. Howlett: That is satisfactory. [4]

Mr. Howlett: As to paragraph 1 and paragraph 3 of the complaint, we will admit those paragraphs.

LAWRENCE C. McNUTT

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: Lawrence C. McNutt.

Direct Examination

Q. (Mr. *Mr.* Mauritsen) Mr. McNutt, are you now employed? A. No. [5]

Q. Have you ever been employed by the L. A. Brick & Clay Products Company? A. Yes.

Q. What time did you start to work for that Company?

A. On or about the 6th day of January, 1937.

Q. How long did you work for the L. A. Brick & Clay Products Company?

A. Until June 3rd, 1937.

Q. Are you an officer of the union?

A. I am.

Q. What is the name of the union?

A. The Alberhill Clay Products Workers Union.

Q. Mr. McNutt, will you tell us of the organization of that union; the steps leading to the organization and how it was formed?

(Testimony of Lawrence C. McNutt.)

A. The first attempt to organize the union started the night of June 1st. A meeting was held in the American Legion Hall at Elsinor by Mr. Greene from Los Angeles.

Q. And what happened at that meeting?

A. Mr. Greene told the purpose of the union and talked concerning our organizing the union, and in the end, that those that wished to come forward and sign and desired to join the union, to do so.

Q. What happened then?

A. About 45 signed up. [6]

Q. About 45 signed up? A. Yes.

Q. That was on June 1st?

A. Right.

Trial Examiner Stephenson: Of what year?

The Witness: 1937.

Q. (By Mr. Mauritsen) 1937. When was the next meeting of the union held?

A. June 5th.

Q. Where was that meeting held?

A. In the Old Age Townsend Hall—the Townsend Old Age Hall at Elsinor.

Q. Just to digress a minute, let's go back to the first meeting. Who was present other than Mr. Greene?

A. Well, there were the workers from the Plant and the foreman of the Plant, Mr. Bodine.

Q. Any others?

A. Mr. Gantz, Mr. Mills and Mr. Baer.

(Testimony of Lawrence C. McNutt.)

Q. Mr. McNutt, you have designated these men as foremen of the plant. What position does Mr. Bodine hold? A. Mr. Bodine?

Q. Yes. A. Superintendent.

Q. Of the entire Alberhill plant?

A. Yes. [7]

Q. I think you testified also that Mr. Baer was present? A. Yes.

Q. What position does he hold in the plant?

A. I believe he is designated as the assistant superintendent.

Q. Assistant superintendent? A. Yes.

Q. You also testified that Mr. Mills was present? A. Yes.

Q. What position does he hold?

A. Pit foreman.

Q. At the Alberhill Plant?

A. At the Alberhill Plant.

Q. And Mr. Gantz?

A. Yard foreman.

Q. Yard foreman of the entire plant?

A. Yes.

Q. And in addition to these four men, there were a number of the employees of the plant present at this first meeting? A. Yes, sir.

Q. Now, the second meeting was held at what time? A. June 5th.

Q. June 5th? A. Yes.

Q. And who was present at that meeting? [8]

A. The employees of the plant and a deputy of Elsinor.

(Testimony of Lawrence C. McNutt.)

A. More of the employees signed to affiliate with the union. We put in for our charter and we elected officers.

Q. Now, at this time how many members or how many employees of the company had applied for application or had filed application for membership in the union; that is, both at that meeting and the previous meeting?

A. I don't have an exact account on that.

Q. Can you give it approximately?

A. Probably about 90, I would say.

Q. About 90? [9]

A. Yes.

Q. That is at both this meeting and the previous meeting? A. Yes.

Q. About how many do you think had applied at the first meeting? A. About 45.

Q. About 45? A. Yes.

Q. About how many applied at the second meeting?

A. Between the time of the first meeting and the second meeting an additional 45, approximately.

Q. So that at the time of the meeting of June 5th, you had a membership, or applications had been signed for about 90 men? A. Correct.

Q. What else transpired at this meeting of June 5? You said an additional number of employees applied for membership in the union?

(Discussion off the record)

Mr. Mauritsen: Will you read the question?

(Testimony of Lawrence C. McNutt.)

(The desired question was read by the reporter.)

A. They were sworn in to membership into the union, and as I said, we elected officers.

Q. What officers were elected at this meeting?

A. A president, a vice-president, secretary and treasurer, [10] and a doorman.

Q. Who was elected president of the union?

A. Edward Hannum.

Q. Who was elected vice-president?

A. Louis Juarez.

Q. Who was elected secretary and treasurer?

A. Myself.

Q. And who was elected doorman?

A. Mark Damron.

Q. Was your organization complete at that time? Did anything further remain to be done to make your organization complete?

A. We had a complete organization with a charter on its way. However, we had more employees to our organization in the following few days.

Q. In the following few days. That was the second meeting, on June 5? A. Yes.

Q. When was the next meeting of the union held? A. June 9th.

Q. June 9th? A. I believe.

Q. Where was that meeting held?

A. In the pool hall at Alberhill.

Q. What business was transacted at that meeting?

(Testimony of Lawrence C. McNutt.)

A. Further employees were added to the union and took the [11] oath of affiliation. We——

Q. Pardon me for interrupting. You have already testified that prior to the meeting of June 9th you had approximate membership of 90 men?

A. Yes.

Q. At the meeting of June 9 you took additional members? A. Yes.

Q. About what was the number of your membership at that time? A. Approximately 100.

Q. Approximately 100?

A. Between 105 and 112. I would have to check on that to be exact.

Q. In other words, you had taken approximately 20 additional members since your meeting on June 5? A. 15 or 20.

Q. 15 or 20 members? A. Approximately.

Q. What was done at that meeting on June 9?

A. We presented a petition to the boys—to the men there.

Q. A petition? A. Yes.

Q. Do you know who drew the petition?

A. Let's see. It was our president, Edward Hannum; vice-president Louis Juarez; and Mr. Lucas—— [12]

Q. It was done, in other words, by the officers of the union?

A. The officers and a few of the additional members.

Q. The officers and a few of the additional members? A. Yes.

Q. It was the union's act, was it not?

A. Yes, it was.

Q. Now, this petition was presented, and what was done then?

A. The petition was presented to the members of the Union, read in English and translated into Spanish, and a secret ballot was cast on its adoption.

Q. On the adoption of the petition?

A. Yes.

Q. And what was the result of that ballot?

A. A unanimous ballot to adopt the petition.

Q. All right. The petition was adopted?

A. Yes.

Q. Then what next took place?

A. We cast another secret ballot on what we should do in case we received no answer from the company regarding our first petition.

Q. Regarding the first petition. Are you referring to the petition that had just been adopted, or a previous one?

A. The one just adopted; the only one up to that time.

Q. What was the result of that?

A. A unanimous ballot cast in favor of strike. [13]

Q. (By Mr. Mauritsen) Mr. McNutt, I hand you this paper, identified as Board's Exhibit No. 2, and ask you if that is your signature appearing at the bottom of the letter? A. It is.

(Testimony of Lawrence C. McNutt.)

Q. Now, you have testified—is there any objection?

Trial Examiner Stephenson: You are offering that in evidence? Mr. Mauritsen: Yes.

Trial Examiner Stephenson: It will be received in evidence and marked Board's Exhibit 2.

(Thereupon the document above referred to was marked as Board's Exhibit No. 2 and received in evidence.)

BOARD'S EXHIBIT No. 2

1. The Los Angeles Brick and Clay Products Company recognize and accept as the collective bargaining agent of its employees the recently formed Union known as the Alberhill Clay Workers' Union, affiliated with the International Mine, Mill and Smelter Workers.

2. That all employees whose services were terminated since the first day of June, Nineteen Hundred Thirty-seven reasons of the reported depression in business and shortage of orders on hand to be filled, be reemployed and put to work at the Alberhill plant of the Los Angeles Brick and Clay Products Company before seven-thirty A. M. Friday, the eleventh day of June, nineteen and thirty seven, and in the existence of said depression of business and lack of orders on hand that the men shall be given equal number of hours of work each month until said depression is over; thus relieving

(Testimony of Lawrence C. McNutt.)

any man or group of men from standing the full brunt of said depression and that all overtime, consisting of time over 8 hours in any one day and 40 hours in any week be paid at the rate of one and one-half time. This article to be in effect until July 15, 1937.

The representatives and (or) the president of the Alberhill Clay Workers' Union be notified of the decision of acceptance or refusal reached by the Los Angeles Brick and Clay Products Company by twelve o'clock mid-night of Thursday the tenth day of June Nineteen hundred and Thirty-seven and in the existence of no notification by the specified hour the Union shall act upon the supposition that their requests have been denied and will not be complied with.

EDWARD E. HANNUM,
President.
LAWRENCE C. McNUTT,
Sec. and Treas.

[Endorsed]: 1/10/38. Board's Exhibit No. 2.

Q. (By Mr. Mauritsen) That is your signature, you say, attached to the bottom of the letter?

A. Yes.

Q. You have testified that at this meeting on June 9 a petition was adopted by unanimous vote of the union? A. Yes.

(Testimony of Lawrence C. McNutt.)

Q. Is that the petition that was discussed at that meeting? A. Yes. [15]

Q. And was approved by a majority of the members of the union? A. Yes.

Q. Now, what was done with that petition after it was approved at that meeting on June 9? What further action in regard to this petition was taken?

A. The following morning, on June 10, three men took one copy of this petition into the office at Alberhill, of the L. A. Brick & Clay Products, and presented it to Mr. Bodine, the superintendent.

Q. Do you know who comprised that committee?

A. Mr. Lucas, Mr. Juarez and, I believe, Mr. Art Hannum.

Q. That was delivered to Mr. Bodine in the company plant at Alberhill? A. Yes.

Q. Was anything else done with it?

A. An exact copy was taken into Los Angeles and delivered at the L. A. Brick & Clay Company office at 1038 Mission Boulevard, Los Angeles.

Q. That was on the morning of June 10, 1937?

A. Yes.

Q. It was presented both to the Alberhill plant and to the Los Angeles plant of Respondent?

A. Yes, sir.

Q. To whom was the petition presented in the Los Angeles [16] office?

A. To one of the girls in the office, there being no one else present to accept it.

(Testimony of Lawrence C. McNutt.)

Q. Now, Mr. McNutt, did you ever receive an answer either from Mr. Bodine or from the Los Angeles office, in answer to this petition?

A. I did not.

Q. Will you please read the first paragraph of Board's Exhibit 2 A. Out loud?

Q. Please.

A. (Reading) "The Los Angeles Brick & Clay Products Company recognize and accept as the collective bargaining agent of its employees the recently formed Union known as the Alberhill Clay Workers Union, affiliated with the International Mine, Mill and Smelter Workers."

Q. I think you have already testified to it, but did you ever receive an answer to that request?

A. No.

Q. You have testified also that in the event no action was taken by the company in regard to the request, that you voted at this meeting on June 9, 1937 to go out on strike. Is that true?

A. That is true.

Q. And receiving no answer from the company, either from [17] Mr. Bodine or from the Los Angeles office, what then happened?

A. We were out on strike on the morning of June 11.

Q. 1937? A. 1937.

Q. And that was a union activity, was it not?

A. Yes.

(Testimony of Lawrence C. McNutt.)

Q. The union having voted to take such action in the event of failure to negotiate? A. Yes.

Q. Now, you have testified that this petition was delivered on June 10. What further effort did the union make to negotiate with the respondent company?

A. After we had been out on strike a few days we again sent them a letter asking them to bargain with us again.

Mr. Howlett: Just a minute. I object to that as not the best evidence. Do you have the letter?

The Witness: I believe the counsel here has it.

Mr. Mauritsen: I would like to introduce this as Board's Exhibit 3.

Trial Examiner Stephenson: Let's get the letter identified.

Mr. Mauritsen: Yes.

Trial Examiner Stephenson: Show the letter to the witness and identify the letter, then offer it in evidence.

Mr. Mauritsen: All right. [18]

Q. (By Mr. Mauritsen) Mr. McNutt, I hand you a letter, or a copy of a letter. You have testified that you sent a request, a further request to the company to negotiate? A. Yes.

Q. Is this a carbon copy of the latter which you forwarded to the respondent company?

A. It is.

Q. I hand you a return receipt showing receipt of a registered letter, which is returnable to your-

(Testimony of Lawrence C. McNutt.)
self. Is that the receipt that you received as the result of sending this letter by registered mail?

A. Yes.

Trial Examiner Stephenson: Do you desire to offer that in evidence as Board's Exhibit 3?

Mr. Mauritsen: Yes. They can be combined. [19]

BOARD'S EXHIBIT No. 3

June 16, 1937
Alberhill, Calif.

L. A. Brick & Clay Products Co.
1078 Mission Road
Los Angeles, Calif.

Gentlemen:

As the representatives of your employees at the Alberhill Plant No. 4, selected by your employees to bargain collectively for them we herewith request that you advise us within three days of a time and place for a meeting to negotiate an agreement.

We recognize that your plant is at present closed down but we have been advised that despite this lockout we are still your employees in fact for the purpose of collective bargaining. Please answer us by return mail setting the time and place for meeting as mentioned above so that it will not be necessary for us to file charges before the National Labor Relations Board of a violation of section eight, sub-

(Testimony of Lawrence C. McNutt.)

section five of the National Labor Relations Act.

Yours truly,

....

Sec. & Treas.

Twin Springs,

Corona, Calif.

Penalty for private use to avoid payment of Postage, $300

Post Mark of Delivering Office

Post Office Department

Official Business

[Postmarked—Los Angeles, Calif. June 17, 1937.]

Registered Article

No. 2103

Insured Parcel

No..............................

Return to L. C. McNutt

(Name of sender)

Street and Number, or Post Office Box—Twin Springs, Star Rt.

Post Office at Corona, Calif.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

L. A. Brick & Clay Products

(Signature or name of addressee)

Lynette G. Rutledge

(Signature of addressee's agent)

Date of delivery 6/17/1937.

(Testimony of Lawrence C. McNutt.)

Mr. Howlett: The date of the letter is June 16; received on the 17th.

Q. (By Mr. Mauritsen) What is the date of the letter, Board's Exhibit 3?

A. June 16, 1937. [20]

Q. (By Mr. Mauritsen) What is the date given on the return receipt as the date of delivery?

A. June 17, 1937.

Q. Was that letter sent to the company's plant at Alberhill, or to the Los Angeles office? [21]

A. It was sent to the Los Angeles office.

Q. It was sent to the Los Angeles office of the L. A. Brick & Clay Products Company?

A. Yes.

Q. Did you ever receive an answer to this letter? A. No.

Q. Was this letter sent as a result of the union? I mean, was it the act of the union or of yourself?

A. It was the act of the officers of the union.

Q. The act of the officers of the union?

A. Yes.

Q. And you did not receive a reply to this letter? A. No.

Q. Did the union make any further attempt to negotiate with respondent company? A. No.

Q. Did the union officials ever meet with respondent company in Dr. Nylander's office in Los Angeles? A. Yes.

Q. What was the purpose of that meeting?

A. The general purpose was to iron out our diffi-

(Testimony of Lawrence C. McNutt.)

culty, I believe, and get a statement from both sides of their opinions for Dr. Nylander.

Trial Examiner Stephenson: For the purpose of the record, let it be shown that Dr. Nylander is the Regional Director [22] of the National Labor Relations Board, 21st Region, and his office is in the Pacific Electric Building in Los Angeles.

Mr. Mauritsen: Yes.

Q. (By Mr. Mauritsen) Who was present at that meeting? A. Mr. Larson——

Q. Just a moment. What connection has Mr. Larson with either the union or the company?

A. He is designated, I believe, as general manager of the L. A. Brick & Clay Products Company.

Q. That is the respondent company?

A. Correct.

Q. Who else was present at that time?

A. Mr. Lucas.

Q. Mr. Lucas is in what capacity?

A. As a member of the union.

Q. As a member of the union? A. Yes.

Q. Who else? A. Mr. Walker.

Q. Mr. Walker is in what capacity?

A. He is a member of the union.

Q. A member of the union?

A. Mr. Juarez.

Q. In what capacity is Mr. Juarez?

A. As vice-president of the union. [23]

Q. Who else? A. Mr. Ed. Hannum.

Q. In what capacity?

(Testimony of Lawrence C. McNutt.)

A. As president of the union.

Q. As president of the union?

A. And myself as secretary and treasurer of the union.

Q. (By Mr. Mauritsen) What was the time of this meeting? On what date was this held?

A. I don't exactly remember the date. Possibly it is in the records of the National Labor Relations Board. It was held in the afternoon, about 4:00 o'clock, I believe.

Q. Do you know approximately what date it was held? A. No, I don't.

Q. Was the strike still in progress?

A. The strike was still in progress. [24]

Q. So that it was before the 25th?

Mr. Howlett: I object to the question as leading the witness. The witness states he doesn't know when it was held.

Trial Examiner Stephenson: Objection overruled. I think he is just trying simply to refresh the witness' mind so he may be able to testify as to the approximate date.

Answer the question.

A. It was before the 25th of June, and it was after the 11th of June.

Q. What happened at that meeting?

A. Mr. Nylander discussed the problem with Mr. Larson and ourselves. The gist of the matter was that Mr. Larson didn't feel it was necessary——

Mr. Howlett: Just a minute. I am going to object

(Testimony of Lawrence C. McNutt.)

to what he felt. Make the statement that he made.

Trial Examiner Stephenson: I am going to overrule the objection at this time, and you may reserve a motion to strike after he finishes. Go ahead.

Mr. Howlett: All right.

Trial Examiner Stephenson: If possible state what was said and who said it. You don't need to state in exact words, but in substances; that Dr. Nylander said so and so and somebody else said so and so.

A. Yes. Mr. Larson made the statement that the men had been [25] laid off not because of labor organization, but because of lack of business, stating that they had had only $17.00 worth of orders in the last 30 days. Mr. Nylander asked him, as near as I can remember, if he would bargain with us at that time at all.

Trial Examiner Stephenson: I didn't get the last of it.

A. If he would bargain with us at all.

Trial Examiner Stephenson: All right. Go ahead.

Q. What did he reply to that question?

A. That Mr. Larson would never have a union in his plant if he had to close it down for good; and also, pointing to me and one of the other boys, that those two men would never go back to work in his plant under any circumstances.

Q. Did he give any further reason, or did he give any reason for that statement?

A. He gave no direct reason.

(Testimony of Lawrence C. McNutt.)

Q. You have testified that the strike began on June 11? A. Yes.

Q. How long did the strike continue?

A. Until 3:00 o'clock—June 25th, 1937, three p. m.

Q. I show you the following letter with the list of names attached thereto. What is that letter?

A. This is a letter mailed to the Los Angeles Brick & Clay Products Company at Alberhill on the evening of June 24. After the strike was called off, asking that the men—— [26]

Mr. Howlett: Just a minute, please. I object to your stating as to what the letter provides. It hasn't been introduced in evidence yet.

Trial Examiner Stephenson: Objection sustained.

Mr. Mauritsen: I am just desiring to identify it.

Trial Examiner Stephenson: That's all, but the witness was going a little beyond that.

Mr. Mauritsen: I wish to offer this in evidence.

Mr. MacLaren: May we see it?

Mr. Mauritsen: Yes.

Mr. Howlett: I object to it at this time on the ground that the proper foundation has not been laid. It appears not to be a carbon copy of the letter, even.

Trial Examiner Stephenson: Will you read the last two or three questions and answers, Mr. Reporter?

(The desired questions and answers were read by the reporter.)

(Testimony of Lawrence C. McNutt.)

Mr. Howlett: I would also like to move to strike that part which goes beyond the question, as to the letter.

Trial Examiner Stephenson: Motion granted. Is this a copy of the original letter?

The Witness: It is a copy of the original letter. That was the first copy, and it has a typographical error in it, and I recopied it and sent it into the office.

Trial Examiner Stephenson: Objection overruled. It [27] will be received in evidence and marked Board's Exhibit 4.

Mr. Howlett: Do you have a copy of it?

Mr. Mauritsen: No, I don't.

(Discussion off the record)

Trial Examiner Stephenson: Proceed.

Q. (By Mr. Mauritsen) Mr. McNutt, did you ever make application for reinstatement, or did you ever ask to be re-employed by the respondent company? A. Yes.

Q. Will you tell us the occasion or occasions upon which you asked for employment?

A. On the evening of June 25, 1937, a group of us went into the office of the plant immediately after the strike signs were pulled down and asked Mr. Bodine for re-employment. He stated at that time that the old man had told him to hire approximately 90 men and no more, and he had that number and could not use us.

(Testimony of Lawrence C. McNutt.)

Q. Did you ever apply for employment after that time?

A. Yes sir, I did, on the following Monday morning.

Q. And to whom did you apply?

A. I came to the office, or to the yard before work the following Monday morning, and on advancing toward the office Mr. Bodine came out to meet me. I told him I was looking for work, and he told me I could not be used, and he would much rather I stay completely off the property. [28]

Q. You said the following Monday morning?

A. I believe.

Q. What was that date?

Mr. Howlett: The Monday following June 25th. I assume that is what he is speaking of?

The Witness: Yes, sir.

Trial Examiner Stephenson: I think that fixes the time.

Q. Did Mr. Bodine give you any reason for requesting that you remain off the company property?

A. No, I didn't ask for one.

Q. Did you make any further application for employment after that time?

A. No. I considered it impossible to do so.

Q. Now, Mr. McNutt, I have shown you this letter which has been introduced in evidence as Board's Exhibit 4. Will you please read the letter?

A. (Reading) "The accompanying list of men hereby place application for re-employment at such

(Testimony of Lawrence C. McNutt.)

a time as you find business warrants re-opening the Alberhill plant. Listed men to be taken back in order of seniority. Yours truly."

And the list accompanying it are the union members.

Trial Examiner Stephenson: Has that been marked?

Mr. Mauritsen: I think not.

Trial Examiner Stephenson: Better let the reporter mark it. [29]

(Thereupon the document above referred to was marked as Board's Exhibit No. 4 and received in evidence.)

BOARD'S EXHIBIT No. 4

June 24, 1937

Alberhill Clay Workers Union
Alberhill, Calif.

L. A. Brick Co.
Alberhill, Calif.

Gentlemen;

The accompanying list of men hereby place application for reemployment at such a time as you find business warrants re-opening the Alberhill plant. Listed men to be taken back in order of seniorrity.

Yours truly,

....

Sec. & Treas.

(Testimony of Lawrence C. McNutt.)

Jose Acosta Jr.—Alberhill, Calif.
Christobal Anaya—Alberhill, Calif.
Jose Arsiga—Alberhill, Calif.
Lawrence Arzate—Alberhill, Calif.
Jose Arzate—Alberhill, Calif.
Jose Aguillar—Alberhill, Calif.
Fortina Ayala—Alberhill, Calif.
W. G. Ashworth—Elsinore, Calif.
Pete Bernard Jr.—Alberhill, Calif.
Pete Bernard Sr.—Alberhill, Calif.
Charles Bland—Elsinore, Calif.
Henry Boontjer—Elsinore, Calif.
F. Burrola—Alberhill, Calif.
D. E. Cathey—Elsinore, Calif.
Alejandro Castillo—Elsinore, Calif.
Feliz Castillo—Alberhill, Calif.
H. G. Chamberlain—Elsinore, Calif.
Gregorio Cordero—Alberhill, Calif.
Jose Domingez—Alberhill, Calif.
Albert Davis—Alberhill, Calif.
Mark Damron—Alberhill, Calif.
Sam Dabich—Alberhill, Calif.
Thomas Esparza—Alberhill, Calif.
M. G. Eaglin—Elsinore, Calif.
M. J. Eaglin—Elsinore, Calif.
S. S. Fierro—Alberhill, Calif.
Kenneth Freeman—Wildomar, Calif.
O. L. Fuller—Elsinore, Calif.
G. B. George—Elsinore, Calif.
Lupe Garcia—Elsinore, Calif.

(Testimony of Lawrence C. McNutt.)

Oliver Gallatin—San Bernardino, Calif.
Jose Gomez—Alberhill, Calif.
Frank German—Elsinore, Calif.
Lawrence German—Elsinore, Calif.
J. D. Grier—Elsinore, Calif.
Antonio Guerra—Alberhill, Calif.
Lester Hazleton—Elsinore, Calif.
Claude Hansen—Elsinore, Calif.
W. T. Harman—Elsinore, Calif.
Carlos Herrera—Alberhill, Calif.
Arthur Hannum—Elsinore, Calif.
Edward Hannum—Elsinore, Calif.
Porfirio Jimenez—Alberhill, Calif.
Louie Juarez—Alberhill, Calif.
Pedro Jimenez—Alberhill, Calif.
John Johnson—Alberhill, Calif.
Francis Kelly—Elsinore, Calif.
Antonio Lemon—Alberhill, Calif.
Ysidro R. Luna—Alberhill, Calif.
Joe F. Lopez—Alberhill, Calif.
Ignacio A. Lemus—Alberhill, Calif.
John B. Lozano—Elsinore, Calif.
Santiago Lemus—Elsinore, Calif.
C. W. Lucas—Star Rt., Corona, Calif.
Lawrence C. McNutt—Star Rt., Corona, Calif.
Stanley Mayer—Elsinore, Calif.
Arnold Moss—Elsinore, Calif.
Raymond Macht—Elsinore, Calif.
Prisiliano Martinez—Alberhill, Calif.
Francisco Maldonado—Alberhill, Calif.

(Testimony of Lawrence C. McNutt.)

Angel Matinez—Alberhill, Calif.
Ray M. Mains—420 Valley, San Bernardino, Cal.
Bert Mayer—Elsinore, Calif.
Louis C. Miller—Elsinore, Calif.
Manuel Moreno—Elsinore, Calif.
Lee E. Michael—Elsinore, Calif.
Harry Mcgonical—Elsinore, Calif.
Nils Martinson—Alberhill, Calif.
R. Mendoza—Alberhill, Calif.
Ferdinand Mendoza—Elsinore, Calif.
Kenneth Norris—Alberhill, Calif.
Paul Ortega—Alberhill, Calif.
Ernest Osborn—Alberhill, Calif.
George Oyas—Alberhill, Calif.
Celedonio Oyas—Alberhill, Calif.
Sylvester Osborn—Alberhill, Calif.
Geo. E. O'Dell—Elsinore, Calif.
Alfred Oyas—Elsinore, Calif.
Aubrey Oliger—Elsinore, Calif.
Gene E. Olufson—Norco, Calif.
John Petersen—Star Rt. Corona, Calif.
Alejo Perez—Elsinore, Calif.
Claude E. Pearl—Elsinore, Calif.
Bacilio Polanco—Alberhill, Calif.
Leandro Polanco—Alberhill, Calif.
Pasqual Perez—Alberhill, Calif.
Francisco Perez—Alberhill, Calif.
Jesus Puga—Alberhill, Calif.
Juan S. Romero—Alberhill, Calif.
Sebastiano Rinetti—Alberhill, Calif.

(Testimony of Lawrence C. McNutt.)

Angelo Rinetti—Alberhill, Calif.
Joe Ruelas—Alberhill, Calif.
Ramon Rodriques—Alberhill, Calif.
Henry Ramirez—Alberhill, Calif.
Remon Rios—Alberhill, Calif.
Hasinto Rios—Alberhill, Calif.
Feliciano Rios—Alberhill, Calif.
Jesus Rios—Alberhill, Calif.
George Randy—Elsinore, Calif.
Glenn W. Reed—Elsinore, Calif.
J. L. Reves—Elsinore, Calif.
Thomas A. Roddy—Elsinore, Calif.
Crispin Salgado—Alberhill, Calif.
C. G. Stewart—Alberhill, Calif.
Ernest Sill—Elsinore, Calif.
John L. Sullivan—Elsinore, Calif.
C. Wayne Starr—Elsinore, Calif.
Mike Toly—Alberhill, Calif.
Mike Torres—Alberhill, Calif.
Lorrin E. Tharp—Elsinore, Calif.
John C. Walker—Alberhill, Calif.
Elpidio Solis—Alberhill, Calif.
Miguel Valenzula—Alberhill, Calif.
Chon Villa—Elsinore, Calif.
Matibidad Villa—Elsinore, Calif.
Gerald Wenker—Elsinore, Calif.
Charles R. Willard—Elsinore, Calif.
Winfred Uhlry—Alberhill, Calif.

[Endorsed]: 1/10/38. Board's Exhibit No. 4.

(Testimony of Lawrence C. McNutt.)

Q. Mr. McNutt, I hand you a number of cards and ask that you identify them.

A. These are the official application for membership cards to our union.

Q. You know the number of those cards?

A. There are 119 cards there, of which 118 were L. A. Brick Company employees.

Mr. Mauritsen: I desire to offer in evidence, as Board's Exhibit No. 5, these cards.

Trial Examiner Stephenson: Any objection, gentlemen?

Mr. Howlett: No objection at this time.

Trial Examiner Stephenson: They will be received in evidence and marked Board's Exhibit 5. I assume you want them introduced as one exhibit?

Mr. Mauritsen: One exhibit, yes.

(Discussion off the record)

Trial Examiner Stephenson: It will be Board's Exhibit 5.

(Thereupon the documents above referred to were marked as Board's Exhibit No. 5 and received in evidence.)

Q. (By Mr. Mauritsen) Mr. McNutt, have you examined these cards carefully?

A. Do you mean to examine them now? [30]

Q. No. I say have you? A. Yes.

Q. Are you acquainted—— A. Yes.

Q. ——with these statements and the dates of those cards? A. Yes, sir.

(Testimony of Lawrence C. McNutt.)

Q. You have testified previously that prior to the meeting, or at the time of the meeting on June 9 you had approximately 112 members. What dates do the majority of those cards bear?

A. From June 1st until June 9th. A very few—possibly 8 or 10—following that.

Q. Approximately how many of these cards had been received at the time when the petition was adopted at the meeting on June 9th?

A. Around 108 or 110; somewhere around there.

Q. Approximately how many of those cards had been signed at the time when you sent the registered letter to the company requesting that they negotiate with you? A. All of them, I am quite certain.

Q. How many of those membership cards had been signed at the time when you met for a conference in Dr. Nylander's office?

A. Not knowing the exact date we met for that conference, I can't state whether they were all signed or whether there were a few following that. [31]

Q. While you were employed by respondent company, did any of the foremen ever talk to you about the union? A. Yes.

Q. On what occasion?

A. The day before I was laid off, on the 2nd day of June, Mr. Gantz came into the kiln in which I was working, and in a slack period, while our wagons were full, he made the statement that we

(Testimony of Lawrence C. McNutt.)
were damn fools to join the C.I.O.; that we should have a local union of our own.

Q. Is that the same Mr. Gantz who attended the meeting on June 1st? A. Yes.

Q. Did he give any reason or did he make any statement clarifying that statement?

A. No, I heard none.

Q. At any other time did any of the foremen talk to you about the union? A. No. [33]

Q. And upon what date were you laid off?

A. June 3rd, 1937.

Cross Examination [34]

Q. (By Mr. Howlett) Referring to Board's Exhibit 5, a number of cards. Were you present when these cards were signed?

A. Not at the signing of all of them.

Q. A portion of them? A. Yes, sir.

Q. Who were they signed before?

A. Before members of the union.

Q. Do you mean signed by members of the union or before members of the union?

A. Before members of the union.

Q. Is there any indication on the cards, or any other record to show who these cards were signed before? A. No, sir.

Q. Are you familiar with all the signatures on these cards?

A. No, sir, I am not familiar with the signatures of the men signing them.

(Testimony of Lawrence C. McNutt.)

Q. After these cards had been signed they were sent to you, as secretary of the union?

A. Yes, sir.

Q. So that you do not know of your own knowledge whether [36] these signatures are correct or incorrect? A. I do not.

Q. Do you know when a person becomes a member of the union; by what action?

A. By being sworn into the union.

Q. The fact that they pay or do not pay dues, does that make any difference? A. No, sir. [37]

Q. You testified that the cards were signed between June 1st and June 9th. [38]

A. Yes.

Q. What is the basis for your knowledge as to those dates?

A. Those cards that were signed between June 1st and June 9th were given to me on and before the meeting of June 9th.

Q. They were all in your possession at that time?

A. All those that had been signed at that time.

Q. And these smaller slips, that are part of the same exhibit, are what?

A. They are the cards that had been paid; the dues had been paid.

Q. The dues had been paid? A. Yes, sir.

Q. And the balance of them had not been paid?

A. Correct.

(Testimony of Lawrence C. McNutt.)

Q. Referring to Board's Exhibit 4, which is the letter which you have testified that you sent to the L. A. Brick & Clay Products Company—the letter that is dated June 24, 1937—you know the letter I am speaking of? A. Yes, sir.

Q. Was there a meeting held prior to your writing that letter? A. Yes, sir.

Q. Which meeting was that?

A. That was a meeting of the men on the picket line, the afternoon of June 25th. [39]

Q. June 25th? A. Yes.

Q. When was the meeting held?

A. On the afternoon, before the strike was called off, June 25.

Q. It was held on June 25? A. Right.

Q. Was there any authorization at that meeting for you to send this letter? A. Yes, sir.

Q. There was? A. Yes, sir.

Q. This letter is dated June 24, the day previous to that meeting.

A. Yes. As I stated before, that letter was really copied, because of the typographical error.

Q. What was that typographical error?

A. The date.

Q. You wrote the letter in advance and took it out at the meeting, is that it? A. Yes, sir.

Q. Was there a vote taken at that meeting?

A. Yes, sir.

(Testimony of Lawrence C. McNutt.)

Q. Was that a secret ballot? A. No, sir. [40]

Q. What kind of a vote was it?

A. It was a hand vote.

Q. How many persons were present at that time?

A. I don't have a total count.

Q. You know whether these men on this list (Indicating) were present?

A. They were not all present.

Q. You have no idea of the men present that took that vote? A. No, sir.

Q. Would you say 5, or 10, or 150?

A. I know there wasn't 150, but I don't know exactly the number.

Q. Where was that meeting held?

A. On the picket line.

Q. Just what proceeding did you go through to hold the meeting on the picket line? Did they stand around or did you call them into groups, or what did you do?

A. They were called into a group and the president asked that we hold a meeting of those present and decide on whether this letter should be presented to the company or not.

Q. Who had charge of that meeting?

A. President Ed. Hannum.

Q. And you were present during all that time?

A. Yes, sir.

(Testimony of Lawrence C. McNutt.)

Q. What was said at that meeting by Mr. Hannum? [41]

A. He called the meeting to order and stated that due to the fact that so many of the men had been forced to go back to work it looked like a hopeless situation at the time and it would be well to call the strike off if they so considered it so, and the vote was cast and the strike was called off. The letter was presented—the vote was taken on the presentation of the letter to the company, and I proceeded with it.

Q. Did you mail this letter yourself?

A. I did.

Q. Where?

A. At the Alberhill post office.

Q. On Board's Exhibit 3, the letter dated June 16, 1937, which also has a return receipt, United States Registered Mail; are you familiar with the letter I am now referring to?

A. That is the second one sent into the company, is it not?

Q. Yes. A. Yes.

Q. Did you sign this letter? A. Yes, sir.

Q. Was there a meeting held prior to the time this letter was written? A. Yes, sir.

Q. Where was that meeting held?

A. In the pool hall in Alberhill.

Q. Who was present at that time beside yourself? [42]

(Testimony of Lawrence C. McNutt.)

A. I believe all the officers of the union and several—I don't know the exact number—of members of the union.

Q. And how many of those would you say were there?

A. That is difficult to determine. I have no roll call.

Q. Did you normally keep records of meetings and the number of people who were there present?

A. No, sir.

Q. You kept no records of that character?

A. I had no records of that character.

Q. Was there an advance notice of this meeting?

A. Yes, sir.

Q. Was that in writing? A. No, sir.

Q. Was that matter discussed at that meeting?

A. Yes, sir.

Q. Did it come to a vote? A. Yes, sir.

Q. By the officers or by the members?

A. By the officers.

Q. The members did not vote?

A. I don't remember the members taking a vote on that. I could not swear to that.

Q. Then after that meeting you mailed this letter to L. A. Brick & Clay Products Company, 1078 Mission Road, Los Angeles, California? [43]

A. Correct.

(Testimony of Lawrence C. McNutt.)

Q. Now, you state that on June 1st, 1937, that your union was started by Mr. Greene of Los Angeles, is that correct? A. Correct.

Q. And that the first meeting was held on that date? A. Yes, sir.

Q. Was there any notification sent to the employees, or how were they called to the meeting?

A. By pamphlet in the brick yard at Alberhill.

Q. And how many employees of the Alberhill plant were there at that time?

A. I did not take a count. [44]

Q. You did not take a count?

A. No. I had no reason to.

Q. Then the second meeting was held four days later on June 5th, is that correct?

A. Yes, sir. [45]

Q. How long have you worked for the L. A. Brick & Clay Products Company?

A. Since the first part of January, 1937 until June 3, 1937.

Q. That was along about the 3rd or 5th, the early part of January?

A. I would have to check back on my cards to see. I don't know the exact date.

Q. What were your duties there?

A. Kiln worker. Drawer.

Q. What does that work consist of?

A. It consists of unloading the tile brick that are in kilns, after being done, and loading them into

(Testimony of Lawrence C. McNutt.)
wagons in which they are transported to the yard.

Q. Have you ever worked in a similar work before, in any other company? [48]

A. No, sir.

Q. What is your home address?

A. Twin Springs, Corona, California.

Q. Is that a small town?

A. No, sir. That is a service station on the road between Elsinor and Corona.

Q. You live there at the present time?

A. Yes, sir.

Q. What means of support have you?

A. I am assisting my father and he is good enough to help us out.

Q. You work in the service station part of the time?

A. Yes. I work around there. I thought of that afterwards. I didn't think of it as a job before, but reconsidering it, possibly it would be considered as a job. We get our board and room there.

Q. Who else?

A. My wife and two children. [49]

Q. You stated that Mr. Bodine, Mr. Gantz, Mr. Baer, and the Pit Foreman—what is his name?

A. Mills.

Q. ——and Mr. Mills was present.

A. Yes.

Q. Where was that meeting held?

A. In the American Legion Hall at Elsinor.

Q. At Elsinor? A. Yes, sir.

(Testimony of Lawrence C. McNutt.)

Q. Did you have notice of that prior to the meeting?

A. The organizer had put out notices.

Q. Did you talk to any of these men at the time of that meeting?

A. No, sir. Not until after the meeting. [50]

Q. You did talk to them after the meeting?

A. We discussed the things there after the meeting, of course.

Q. Did they participate in the discussion?

A. Who do you mean by they?

Q. I mean these men I have just named?

A. I don't know what they had to say at the meeting. I did not talk with them.

Q. Did they participate during the meeting?

A. No, sir. [51]

Q. Then we come down to the third meeting; that was on or about June 9, 1937. Prior to the meeting of June 9, do you know the number of men that had signed cards in your union?

A. What is the date?

Q. Prior to June 9?

A. I haven't knowledge of the exact number. I can very well check it.

Q. That is represented by these cards right here (indicating)? A. Yes, sir.

Q. On the date of June 9 you called the third meeting. Where was that held?

A. We called the third meeting.

Q. Where did you have your third meeting?

(Testimony of Lawrence C. McNutt.)

A. We had a third meeting on June 9.

Q. Yes. Where was that held?

A. That was held in the pool hall at Alberhill.

Q. And some additional men joined the union at that time? A. Yes, sir.

Q. Do you know how many? A. No, sir.

Q. Do you have a record?

A. It would be those that were dated between June 5th and June 9th, on the cards.

Q. I see. And at that meeting you stated that you presented [52] a petition, referred to as Board's Exhibit 2. Do you know the letter that I refer to?

A. If that is the petition.

Q. Yes.

A. Yes, I know the letter.

Q. During any of the times we have been talking about, and [53] during the time you have been a member of the union and during the time you have been employed at the company, was there any discussion as to rates of pay *between or* your union and the L. A. Brick & Clay Products Company?

A. Not until that petition was presented. Not after that.

Q. I am speaking about rates of pay?

A. No. We did not discuss it. Not the union and the company.

Q. Never was it discussed about rates of pay?

A. Not to my knowledge.

Q. You were apparently then satisfied with the rates of pay you were receiving?

(Testimony of Lawrence C. McNutt.)

A. No.

Q. But you didn't say anything about?

A. No. [54]

A. Well, considering the plant at Alberhill, three men took it in and presented it to Mr. Bodine, and another copy was presented in the Los Angeles office in the same manner.

Q. When was that presented at the Alberhill plant? A. When?

Q. What time of day?

A. Before 7:30 in the morning. The 10th, I believe.

Q. To whom was it presented?

A. Mr. Bodine.

Q. And were you one of the three that presented it? A. No, sir.

Q. You were not one of the three?

A. No, sir.

Q. Had you prior to this time ever notified them of the request that you made in this petition?

A. No, sir.

Q. Was there any discussion in your meeting as to the fact that unless this was acted upon by 12:00 o'clock midnight on the 10th—was the fact that the letter was not delivered [55] until the 10th discussed in your meeting? A. No, sir.

Q. In other words, this matter had not been considered in the way of any discussion between yourself as to the shortness of the notice between the time of its presentation and the strike was called?

(Testimony of Lawrence C. McNutt.)

A. I don't remember the exact things that were carried on there, but there might possibly have been something said about the shortness of the period for sending that in; but if it was, and there probably was, the matter would have been brought up, and the delay was—we were being fired as fast as we joined it and to delay longer would just have been worse.

Q. That was your opinion, of course?

A. Yes.

Q. You are not familiar with the production records or the sales records of the company?

A. I have no office connection there.

Q. And you did not receive an answer to your letter by 12:00 o'clock midnight of the 10th?

A. No, sir.

Q. And as a result the strike was called the following morning? A. Yes, sir.

Q. At what time? [56]

A. 7:30.

Q. 7:30?

A. I think that is the correct time.

Q. Was this vote taken by a ballot?

A. Yes, sir.

Q. What type of a ballot?

A. Secret ballot; a slip of paper.

Mr. Mauritsen: I will object to that, Mr. Examiner. He hasn't said what ballot he is referring to.

(Testimony of Lawrence C. McNutt.)

Mr. Howlett: I am still talking about the same letter.

Trial Examiner Stephenson: You understood the questions?

The Witness: He refers to this paper that we presented the company?

Trial Examiner Stephenson: Yes.

Mr. Howlett: That is correct.

The Witness: That's right.

Q. (By Mr. Howlett) How many ballots were cast at that time?

A. 50, I believe, or thereabouts.

Q. Are those ballots kept after they are cast?

A. No, sir.

Q. Are they recorded in any book that you have? A. Yes, sir.

Q. What is the name of that book? What do you call it?

A. I am not secretary enough to be acquainted with the [57] terms.

Q. I am trying to find out what book it is.

Do you have a book that you keep all these things in?

A. I didn't have a set of books at that time, and I jotted it down on a slip of paper.

Q. Is that kept in a loose-leaf file?

A. Yes.

Q. Are all your meetings kept that way?

(Testimony of Lawrence C. McNutt.)

A. They were up until the time I received my books, which was later on.

Q. So you don't have a record of that ballot, except——

A. Except that it was the unanimous ballot of all present.

Q. Do you know who was present at that meeting? A. The officers——

Q. I will withdraw that.

Those present were employees of the L. A. Brick & Clay? A. Yes.

Q. Now, going back to Board's Exhibit 3, which was sent by registered mail to the L. A. Brick Company——I will leave off the balance of the name.

Trial Examiner Stephenson: It will be understood that when you refer to the L. A. Brick Company, that it is the Respondent?

Mr. Howlett: Yes.

Mr. Mauritsen: And also the union. [58]

Trial Examiner Stephenson: And the union. Whenever we refer to "the union" it is the Alberhill Clay Products Workers Union No. 373.

Mr. Howlett: All right.

Q. (By Mr. Howlett) After this letter was sent in, which I referred to as Board's Exhibit 3, so that you may know what I am talking about.

A. Yes, I know the letter.

Q. No further attempt was made on your behalf to discuss the matter with your employer?

(Testimony of Lawrence C. McNutt.)

A. No.

Q. Then after that, and at a date which we haven't been able to determine, you went to Dr. Nylander's office in Los Angeles in connection with your affairs?

A. I can't say that we did after that. I believe it was before that.

Q. Prior to that time?

A. I can't say.

Q. Who were the parties present at that time?

A. Mr. Larson, Mr. Nylander, Mr. Lucas, Mr. Juarez——

Q. Mr. Walker?

A. Mr. Ed. Hannum, Mr. Walker and myself, as I remember it. [59]

Q. Did you find at that time that the representatives of the L. A. Brick Company were also there?

A. Mr. Larson was there preceding us.

Q. Were there any others present beside the ones you have named?

A. Mr. Sugar from the C. I. O. may have been there. I remember now. He was there for the latter part.

Q. Mr. who?

A. Mr. Sugar from the C. I. O. Headquarters, for the latter part of the conference.

Q. Where was this conference held, if you did hold a conference?

A. In Mr. Nylander's office in Los Angeles.

(Testimony of Lawrence C. McNutt.)

Q. (By Mr. Howlett) Had you received a notice from the National Labor Relations Board prior to that time to be present at that meeting?

A. Yes, sir.

Q. And what was the purpose of the discussion?

A. To discuss our difficulties with Mr. Larson. [60]

Mr. Mauritsen: I object to that. How would the witness know what the purpose was?

Trial Examiner Stephenson: Objection sustained.

Q. (By Mr. Howlett) What was said by Dr. Nylander when you went into the office as to what he wished to do? Did he ask any questions?

A. I can't remember what Dr. Nylander said himself.

Q. Was there any discussion about the strike and how it was caused and what was going on out there?

A. There was a general discussion of the strike. Whether it was brought up about why it was caused, I don't know. I believe there was something introduced about the violation of the Labor Act concerning it.

Q. Who was the spokesman in behalf of the union at that time?

A. I think I spoke, mostly myself.

Q. Was there any discussion of the fact that you were not asking anything about wages or working conditions, other than the fact that you wanted

(Testimony of Lawrence C. McNutt.)
the work distributed so that each man would have an equal amount of work?

A. Yes, sir, there was.

Q. There was some discussion on that?

A. Yes, sir.

Q. And what did you say about that?

A. I think we brought up the subject of our first offer to the company, of the 10th, and we asked if that was an [61] unreasonable request, that the work be distributed among the men and time and a half for anything over 40 hours, I believe it was.

Q. Were you there during all the time Dr. Nylander and Mr. Larson were present? Did you go out together?

A. Dr. Nylander and Mr. Larson were there before I came.

Q. Were they there after you left?

A. I believe we left together.

Q. Was any statement made by any of you as to the particular request that you made about distributing the work so that all the boys would have the same amount of time?

A. We thought it a fair and reasonable demand, and I think we discussed it as such, but that was the end of it.

Q. Was there any ruling made at that time by Dr. Nylander as to whether that was reasonable or just?

A. No ruling that I know of.

(Testimony of Lawrence C. McNutt.)

Q. Didn't you know at the conclusion of the meeting that the matter would be dropped or that they would go further with the matter?

A. I believe Dr. Nylander made the statement that we weren't getting anywhere by trying to discuss it with Mr. Larson, so just as well drop it for the time being. Something to that effect.

Q. Was there any statement made that your request was unfair, and by so doing you were attempting to run the business? [62]

A. Yes, sir.

Q. Did you state at that time that if they had the union label on the product it could sell itself and you could go out and sell more than they could make?

A. I made the statement that a union label would undoubtedly further the sales of the product, and anybody could go out and sell over $17.00 worth of business in that time.

Q. At that time was there any statement by the Board that the request you made was unfair and you couldn't expect to have them grant it?

A. About what request I made?

Q. About the distribution of the work?

A. No.

Q. You heard no conversation to that effect?

A. No.

Q. After that meeting adjourned were you satisfied that the matters had been or had not been adjusted?

(Testimony of Lawrence C. McNutt.)

A. That they had not been adjusted.

Q. And shortly thereafter the strike was called, is that right? A. No, sir.

Q. The strike was called before that?

A. Yes.

Q. And that is why you came up there?

A. Yes, sir. [63]

Q. This was an informal proceeding you had before the Board?

A. Informal, yes.

Q. In other words, did your union make a request for the hearing? Did they file a complaint?

A. I think not.

Q. Was there any complaint filed?

A. Yes, sir; a complaint was filed with Dr. Nylander.

Q. When was that complaint filed?

A. I don't remember the exact date.

(Discussion off the record.)

Q. Your complaint at that time was about some employees that had been laid off on or about June 2nd, 1937? A. Right.

Q. Is that correct? That is according to this charge here. A. That is correct.

Q. I will show you this so that you may know what I am talking about. A. Yes, sir.

Q. And that is the matter you went up to discuss, other than the matter that I have been speaking about, about the distribution of work?

(Testimony of Lawrence C. McNutt.)

A. Yes, sir.

Q. That was also discussed?

A. I believe that was discussed, too. To re-employ the men and distribute the work among them. [64]

Q. That is the total number of men that had been employed prior to the lay-off?

A. Yes, sir.

Q. So that whatever the work was, it would all be divided equally? A. Yes, sir.

Q. Did you discuss with Mr. Larson at that time the practicability of doing such a thing, from an operating standpoint?

A. He did not bring that up at all. [65]

Q. I am not trying to establish the names of your union members. I am trying to establish that there are a number of your union men now working at the Brick Company? A. Yes.

Q. That is a fact? A. Yes.

Q. A number of these men went out on strike at the time you had your difficulty?

A. Yes.

Q. And have since been re-employed?

A. Yes, sir. [68]

Redirect Examination

Q. (By Mr. Mauritsen) Mr. McNutt, while you were working for the company, did you receive any increases in pay? A. Yes, sir.

(Testimony of Lawrence C. McNutt.)

Q. Could you tell the Examiner what increases you received?

A. I started working at 40 cents an hour, and at the end of——now, I don't remember whether it was 30 days or 60 days that I received a 5 cent raise to 45 cents an hour. That is the customary thing there. I have forgotten just the period of time that elapsed. On June 1st I received a raise of 2½ cents an hour——

Mr. Howlett: June 1st?

The Witness: June 1st.

Q. (By Mr. Mauritsen) 1937?

A. 1937.

Q. How were you notified of the first raise you received, to 45 cents an hour? [69]

A. At the time I was employed by the company they told me that at the end of this period of time, a month or two months, I have forgotten now which it was, that my pay would automatically be increased to 45 cents if they found my work satisfactory.

Q. How were you advised of the increase that you received on June 1st?

A. By a bulletin that was posted on the bulletin board in the office at Alberhill; a general raise of 2½ cents for each man.

Q. About on what date was that bulletin posted?

A. Well, it was a few days before the first of June. I don't know now what date it was.

(Testimony of Lawrence C. McNutt.)

Q. Had you ever received any complaints concerning your work while you were engaged by the respondent company?

A. No direct complaint of my work itself. One complaint from Mr. Larson for breaking tile out of the kiln. It was cracked and we had orders to do that if it was cracked; and Mr. Larson didn't like the order and had it changed. But other than that there was never any complaint of my work.

Q. In other words, the only time you received a complaint of your work was from Mr. Larson, and the matter about which he had complained had been the result of an order from somebody else?

A. Yes, sir. [70]

Q. So that, as far as you know, your work with the company was satisfactory?

A. Yes. I might add to that: The evening I was laid off I asked our foreman, Mr. Gantz, if my work had fallen down and as a result of it I had been laid off. He said that had nothing to do with it——that didn't have anything to do with it. I worked directly under him.

Q. What was the date of your lay-off?

A. June 3rd.

Q. What was the date on which you joined the Union? A. June 1st.

Q. At the meeting on June 1st?

A. Yes. [71]

(Testimony of Lawrence C. McNutt.)

Recross Examination

Q. (By Mr. Howlett) How many are there in your crew?

A. There were four in the kiln and five, generally, in the yard, including the truck driver.

Q. And they work as a unit?

A. Yes, as a crew. [73]

Q. (By Mr. Gately) Did the job you hold require any particular skill?

A. Anybody that had nimble fingers and a willing back could do it.

Q. Anybody that was there a few weeks could do it just as good as a man that had been there for 20 years?

A. He should be, or he shouldn't be there. [75]

EDWARD E. HANNUM,

called as a witness by and on behalf of the National Labor Relations Board, having been first duly sworn, testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: Edward E. Hannum.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Hannum, are you now employed? A. I am not.

(Testimony of Edward E. Hannum.)

Q. Have you ever at any time worked for the respondent company? A. Yes, sir.

Q. When did you start to work?

A. I don't remember the exact date now, but it was approximately——I worked for them approximately two years.

Q. That is until what time?

A. Until June 7.

Q. 1937?

A. 1937. Approximately two years. I don't know just exactly the dates.

Q. Of what did your work consist while you worked for Respondent?

A. I started in as just a general laborer. Then I was put with a sewer pipe drawing gang; also worked helping in the [77] tile and brick drawing gang. I worked as a tractor driver; and at the end I was working on the dry press.

Q. On the dry press?

A. Dry press.

Q. What was your wage when you started with the company?

A. I think it was 37½ cents.

Q. Did you receive any raises in pay while you were working for Respondent?

A. Yes, sir. I received an increase to 40 cents, then to 45 cents, then a blanket raise to 47½ cents.

Q. That was this general raise on June 1st?

A. Yes, sir.

(Testimony of Edward E. Hannum.)

Q. So that at the time when you were last employed for Respondent you received 47½ cents an hour? A. Yes, sir.

Q. Did you ever receive any complaint regarding your work?

A. No, sir. In fact, I was very highly recommended as a workman by Mr. Bodine, and at the time I was laid off I also got a letter of recommendation recommending me to any future employer—

Mr. Howlett: Just a minute. If that letter is available it will be the best evidence of what it contains.

The Witness: I was going to bring it to you this morning, but I forgot. I can bring it to you tomorrow morning.

Mr. Howlett: I think we had better have it. [78]

Trial Examiner Stephenson: The letter is the best evidence.

The Witness: I will bring it tomorrow morning.

Mr. Howlett: I move to strike that portion about what was in the letter.

Trial Examiner Stephenson: It may be stricken.

Q. (By Mr. Mauritsen) Then you had received no complaint regarding your work?

A. No, sir.

Trial Examiner Stephenson: That is, that portion of his answer stating what the letter contained will be stricken. The fact that the letter was received by him will not be stricken.

(Testimony of Edward E. Hannum.)

Q. (By Mr. Mauritsen) What was the first meeting of the union that you attended?

A. The meeting of June 1st, 1937.

Q. Who was present at that meeting?

A. Well, there was quite a few of the employees of the L. A. Brick Company, and Mr. Arthur Bodine; Jack Baer, and Mr. Mills.

Q. Did you sign an application card to join the Union at that meeting? A. Yes, sir.

Q. You knew approximately the number of employees of Respondent who signed application cards at that meeting? [79]

A. I should say it was in the vicinity of 45; I am not just sure.

Q. It might have been 40 or it might have been 50? A. Yes, sir. [80]

Q. (By Mr. Mauritsen) Now, were you present at the union meeting held June 5, 1937?

A. Yes, sir.

Q. Can you tell us what took place at that meeting in regard to yourself?

A. I was elected president of the local. [81]

Q. On what date were laid off by Respondent company? A. June 7, 1937.

Q. You were elected president of the union on June 5th? A. Yes, sir.

Q. At the meeting of June 5th?

A. Yes, sir.

Q. And you were laid off on June 7th?

(Testimony of Edward E. Hannum.)

A. Yes, sir.

Q. Were you present at the union meeting on June 9? A. Yes, sir.

Q. Will you tell the Examiner what happened at that meeting?

A. Well, we took in more members. More members signed their cards. [82]

Q. Was that the first business taken up?

A. I think it was. That was usually the first thing we done, was get all the new members that we could. That was what we were working toward.

Q. Then what was the next business that was taken up?

A. We drafted a letter to the L. A. Brick of our demands.

Trial Examiner Stephenson: You refer to what particular letter there?

Mr. Mauritsen: I think we have that as Board's Exhibit 2.

Trial Examiner Stephenson: Board's Exhibit 2?

Mr. Mauritsen: Yes.

Q. (By Mr. Mauritsen) I hand you Board's Exhibit 2 and ask you if that is the meeting to which you are now referring? A. Yes, sir.

Q. Did you conduct the meeting?

A. Yes, sir.

Q. Is that customary for the president of the Union? A. Yes, sir.

(Testimony of Edward E. Hannum.)

Q. At what time did the workers go out on strike? What date?

A. The date was June 11, 1937.

Q. And what did you do after the workers or while the workers were out on strike?

A. Well, as president of the local, I was designated to [83] take charge of the picket line, see that everything was run in an orderly manner, and to be present on the picket line all the time that I could and divide my strikers into shifts so that no one man or no group of men would have to stand all the duty. [84]

Q. (By Mr. Mauritsen) Mr. Hannum, you have testified that the union delivered this petition, which they adopted at the meeting of June 9th, to the company? A. Yes, sir.

Q. Did the company ever respond to that request, to you, as president of the union?

A. No, sir.

Q. Did they respond to you in any other capacity? A. No, sir.

Q. What meetings of the union did you attend after the meeting held June 9th?

A. I attended all meetings. As to the exact dates, it has [88] been so long ago now since we had those meetings, and I never looked the papers over since then to refresh my memory on the dates of these meetings.

(Discussion off the record.)

(Testimony of Edward E. Hannum.)

Q. I hand you Board's Exhibit 3. Were you present at the meeting at which that letter——or the sending of that letter was authorized?

A. Yes, sir.

Q. Did you, as president of the union, ever receive any reply to that letter? A. No, sir.

Q. Were you present at the meeting, at the conference which was held in Los Angeles, at which were present Dr. Nylander and Mr. Larson?

A. Yes, sir.

Q. At that conference what discussion took place between you and Mr. Larson, the Respondent's superintendent?

A. Well, Mr. Larson made a remark——he wanted to know if we thought we could run his business for him; if we thought we knew how to run his business; and I told Mr. Larson that we weren't trying to run his business; that we were just merely trying to get together as a collective bargaining agent. I said there wasn't a one of us at that plant that had the ability or even thought we had the ability to even begin to run his business. [89]

Q. Did he offer to negotiate with you or with the union at that meeting? A. No, sir.

Q. During all the time that you have been president of the union, have you been successful in getting the company to negotiate with you?

A. No, sir.

(Testimony of Edward E. Hannum.)

Q. What date were you laid off?

A. June 7th, 1937.

Q. And on what date were you elected president of the union? A. June 5th.

Q. 1937? A. 1937.

Q. On what date was the strike called off?

A. June 25th, 1937.

Q. Have you ever applied for reinstatement?

A. Yes, sir.

Q. What was the first occasion upon which you applied for reinstatement?

A. It was the evening of June 25th, 1937.

Q. And what happened at that time?

A. I asked Mr. Bodine if there would be any chance of going back to work and he told me, no. I don't remember his exact words, but they were to the effect that they weren't needing any more men then. [90]

Q. Did you ever apply for work after that time?

A. Once.

Q. Upon what date was that?

A. I don't remember. It was later on. Probably a week or a week and a half. Something like that.

Q. You first applied on June 25th, so that a week or so later would be around the 2nd of July?

A. Approximately around there. I don't remember the exact date.

Q. And to whom did you apply?

(Testimony of Edward E. Hannum.)

A. Mr. Bodine.

Q. And what was his answer at that time?

A. That he was sorry, but they just didn't need me, or words to that effect. I don't remember his exact words.

Q. Now, Mr. Hannum, I hand you Board's Exhibit 4 and ask you if your name appears upon the list attached to that exhibit? A. Yes, sir.

Trial Examiner Stephenson: May I see that for just a minute, please?

Mr. Mauritsen: Yes.

(Mr. Mauritsen hands document to the Trial Examiner.)

Q. Mr. Mauritsen: Do you know of your own knowledge whether there has been any lay-offs at Respondent's plant prior to the lay-offs which occurred commencing June 2nd? [91]

Mr. Howlett: I object to that as not being definite enough. Coming within the reasonable period of what time?

Mr. Mauritsen: Within two years.

A. There hasn't been such a lay-off as this, no, sir.

Q. Had there been any lay-offs involving a considerable number of persons?

A. No, sir, not that I remember of.

Q. Did you receive the general raise that was given June 1st, 1937? A. Yes, sir.

(Testimony of Edward E. Hannum.)

Q. What was your pay at that time? At what rate were you paid? A. 47½ cents.

Q. If the Board should issue an order, ordering Respondent to reinstate you, would you be willing to go back to work at this time?

A. Yes, sir.

Cross Examination

Q. (By Mr. Howlett) Mr. Hannum, are you acquainted with [92] most of the people working in the plant or that worked in the plant at the time you worked there? A. Yes, sir.

Q. In other words, you are pretty generally acquainted with the men that worked there by name and by sight, and so forth?

A. With the biggest share of them. There is lots of them——some of the Mexican boys that I didn't know, but pretty near all of them.

Q. Have you seen a number of them since that time either there or around the factory, or elsewhere?

A. I have seen several of them, yes, sir.

Q. You have had conversations with them about whether they were working or whether they weren't working?

A. Some of them, yes, sir.

Q. Isn't a fact that quite a number of those men that were laid off are back to work at the same plant? A. Yes, sir.

(Testimony of Edward E. Hannum.)

Q. Do you know how many of the men that were laid off, at the time you testified as being a large lay-off, how many of those men returned to work?

A. I don't know.

Q. But you do know that quite a number of them did? A. Yes, sir.

Q. And quite a number of those men that returned to work are union men, isn't that a fact? [93]

A. Yes, sir.

Q. And do you know that some of the officers of the union still work there?

A. Yes, sir. [94]

Q. (By Mr. Howlett) Did you ever tell your employer that you joined the union?

A. I didn't have to.

Q. I didn't ask you that.

A. No, sir.

Q. (By Mr. Howlett) Do you recall the date on which you attended a meeting at Dr. Nylander's office? There is no one else who remembers that. Do you know it?

A. No, sir, I don't remember the date. I was there, but as far as the date goes, I don't know.

(Discussion off the record.)

Trial Examiner Stephenson: All right. Let's go ahead.

Q. (By Mr. Howlett) You stated that Mr. Larson was there, and who else besides yourself?

(Testimony of Edward E. Hannum.)

A. Let's see. There was Lawrence McNutt, and there was——

Q. Well, in other words they were the same people testified to by Mr. McNutt this morning?

A. Yes, sir.

Q. That was held in the afternoon or morning of that day? A. Afternoon.

Q. And in the office of Dr. Nylander's private office? [97] A. Yes, sir.

Q. Did you receive a notice to come there?

A. No. The way it seems to me now——the way I recall it, we had come in to see Dr. Nylander and talk over with him the situation out there; being that he was Regional Labor Director we wanted to find out——we didn't know whether we were right or wrong or indifferent, and we just wanted to find out where we stood and one thing and another like that. During our conversation with him in the morning he said he would try to get Mr. Larson up to his office and see if we couldn't hold a little discussion up there. As I understood it, he called Mr. Larson up and then he told us that Mr. Larson would be there around 4:00 or 4:30 in the afternoon——that is the way I recall it——and for us to return to his office then.

Q. And you did? A. Yes.

Q. The whole group returned at that time, or substantially so?

A. With one exception.

(Testimony of Edward E. Hannum.)

Q. Yes.

A. In the morning when we were at Dr. Nylander's office there was one other fellow—this William Ashworth was with us in the morning, and then we returned to Alberhill and he stayed at Alberhill; and I think Mr. Walker was the one that replaced Ashworth at that meeting. [98]

Q. Who was the spokesman for your group at that time?

A. I don't know as we had any special spokesman. There wasn't anybody designated.

Q. Well, did you ask some questions?

A. I don't remember as I asked any.

Q. Well, what did you talk about up there?

A. I can't remember that. From my recollection I can't remember that there was an awful lot of anything said. Any of us couldn't seem to get started or come together.

Q. Didn't the doctor ask you, "What is your difficulty? What are you doing? What is being done and what is this all about?"

Did he ask you something like that?

A. I don't remember what was said. I wouldn't want to go into it.

Q. You got nothing out of that meeting at all? You don't recall of accomplishing anything and you don't remember anything that was said there?

A. We never accomplished a thing. [99]

Q. So it wasn't a very satisfactory conference?

(Testimony of Edward E. Hannum.)

A. No, it wasn't satisfactory at all. It has been so long that I don't remember the conversation. [100]

You say you applied for work since you left. You were not taken back? A. No, sir.

Q. And there was no reason given?

A. Outside that they just didn't need me. [101]

A. Since the strike I have worked very little. Just odd jobs around. I haven't had very much.

Q. Are you married? A. Yes, sir.

Q. Any children? A. Yes, sir.

Q. Where do you receive your support?

A. Well, for a while I was on relief, then I got a job and I quit the relief. I took this job and that didn't last very long. It was just a matter of a week or so, and I got back on relief again. And I got a promise of another job and I took it, and that didn't last; just a short time, and then I went back on relief the second time. And I was on relief for a while, then I got word of another job in San Diego that was supposed to last a year, so I quit relief right now, on one day's time, to go to San Diego to take this job, and instead of a year it played out——I think altogether I was down at San Diego about six weeks, and I think altogether this job [102] gave me a little better than a week scattered out all the way through. Then out I went again, and now I am not on anything. If it wasn't that I didn't have awful good credit in San Diego

(Testimony of Edward E. Hannum.)

we would have starved——or in Elsinor, I mean.

Q. At the time of the meeting of the union on June 1st you had not paid your dues at that time?

A. Not on June 1st?

Q. You paid them some time later?

A. I paid part of them; not all of them. I did not have money enough.

Q. You never have paid all your dues?

A. Not all of my dues.

Mr. Howlett: That is all.

Trial Examiner Stephenson: Any redirect examination?

Mr. Mauritsen: Yes, I have some questions.

Trial Examiner Stephenson: Proceed.

Redirect Examination

Q. (By Mr. Mauritsen) Mr. Hannum, counsel for Respondent asked you if the company knew that you were a member of the union; which called for a conclusion.

Mr. Howlett: I think the record will show that I asked him whether he told them that he was.

(Discussion off the record.)

Q. I will ask you if you were present at the meeting on June 1st? [103] A. Yes, sir.

Q. Did you sign an application card for membership in the union? A. Yes, sir.

Q. At that meeting? A. Yes, sir.

Q. Was Mr. Bodine, Mr. Larson, Mr. Gantz and Mr. Mills present at that meeting on June 1st?

(Testimony of Edward E. Hannum.)

A. Will you name them again please?

Trial Examiner Stephenson: The reporter will read the question.

(The desired question was read by the reporter.)

A. Mr. Larson wasn't.

Q. Mr. Larson wasn't? A. No, sir.

Q. Were the others I have named?

A. Yes, sir.

Q. These men worked for the Respondent, did they not? A. Yes.

Trial Examiner Stephenson: In what capacity?

The Witness: Mr. Bodine is plant superintendent; Mr. Gantz, I don't know just exactly what he would be. I would say he was yard foreman. He has charge of the yard. And Mr. Mills has charge of the pit crew.

Q. (By Mr. Mauritsen) Now, Mr. Hannum, were you ever able [104] to negotiate with the company, as representative of the union?

A. No, sir.

Q. In individual negotiations, could you walk up to Mr. Larson or Mr. Bodine and say, "Gus," or "Art," as the case may be, "Something isn't quite in order here and we would like to talk it over?"

Could you do that?

Mr. Howlett: I object to the question as calling for a conclusion of the witness.

Trial Examiner Stephenson: Objection overruled. Go ahead. Can you answer that?

(Testimony of Edward E. Hannum.)

A. Well, I never did. [105]

Recross Examination [107]

Q. (By Mr. Gately) Do you know of any of the real active members of the union who have been put back to work?

A. Yes, sir; Louis Juarez.

Q. Is he the only one?

A. And Mark Damron is back. Those are the only two I can recall now that were active members. They were officers of the union. [110]

Recross Examination

Q. (By Mr. Howlett) Were all the men on strike on the picket line——

A. Yes, sir. [111]

Q. ——every day. How many men were there on the picket line?

A. I don't know the exact number. Each day we must have had around approximately a hundred or a hundred and some odd, each day out there. [112]

Redirect Examination [113]

SYLVESTER OSBORNE,

called as a witness by and on behalf of the Labor Board, having been first duly sworn, testified as follows:

(Testimony of Sylvester Osborne.)

Trial Examiner Stephenson: State your name, please.

The Witness: Sylvester Osborne.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Osborne, have you ever worked for the respondent company in this hearing?

A. You mean the L. A. Brick & Clay?

Q. Yes. A. Yes, sir.

Q. When did you start to work for the Respondent?

A. I started in 1936; after Labor Day in 1936. I don't know what day; about the 7th.

Q. That was in—— A. In September.

Mr. Howlett: I will stipulate he started on September 8th.

The Witness: Something like that.

Trial Examiner Stephenson: Will you accept the [114] stipulation?

Mr. Mauritsen: Yes, it is accepted.

Q. What work did you do at the Respondent's plant?

A. I worked around in the yard as a laborer, then I built wickens, then I was truck driver helper, and then I would drive a truck.

Q. What wage did you receive when you went to work? A. 40 cents an hour.

(Testimony of Sylvester Osborne.)

Q. Did you receive any raises in wages while you were working for Respondent?

A. Yes, sir; 5 cents one time and 2½ cents another time.

Q. Do you recall at what time you received the 5 cent raise?

A. No, I couldn't recall that time. I know I got the raise. That's all.

Q. You heard Mr. McNutt testify as to the general policy of the company to give the employees a raise after 30 or 60 days?

A. Well, I started at 40. Before they got the 5 cent raise they had to work there so long.

Q. This last raise you received, was that the general raise that had been given throughout the plant?

A. Yes, they gave a 5 cent raise and a 2½ cent raise later.

Q. Have you ever received any complaints regarding your work?

A. I don't think so. I never did, no, sir. I got a [115] recommendation to that effect.

Q. Did you attend this first meeting held June 1st, 1937?

A. The first meeting they had up there.

Q. Did you sign an application for membership in the union at that meeting?

A. Yes, sir.

Q. When were you laid off?

(Testimony of Sylvester Osborne.)

A. I wasn't laid off.

Q. Did you go out on strike? A. Yes, sir.

Q. Have you ever applied for reinstatement?

A. Yes, sir.

Q. On what occasion?

A. Well, after the strike was called off they told us to go back and ask for our jobs, and I went in and asked for my job back.

Q. After June 25th?

A. I couldn't just recall that. They come down there and told us that the strike was called off and Nylander said it would be best to ask for our jobs back, and I went into the boss and asked for my job. I never kept no dates as to that.

Q. When you re-applied for your job, to whom did you re-apply? A. Mr. Bodine.

Q. What did he say at that time? [116]

A. He said he didn't have no place for me. He said I had better look some place else for a job.

Q. Did you ask for a recommendation at that time? A. No, sir.

Q. Did you apply for work at any time after that? A. Yes, sir.

Q. To whom did you apply?

A. Mr. Bodine.

Q. What did he say?

A. He said he didn't have nothing for me. I asked him for a recommendation and he wrote me a recommendation, and he said he didn't have noth-

(Testimony of Sylvester Osborne.)

ing against my work at all, and he wrote me a recommendation. Do you want to see the recommendation?

Q. No. I think it is sufficient.

Mr. Howlett: Better get it out. I would like to look at it.

Mr. Mauritsen: All right.

(Witness hands document to Mr. Howlett.)

Q. (By Mr. Mauritsen) Did Mr. Bodine say anything at that time regarding the union?

A. I told him I would like——no, he never said anything about the union at all. He said, "We boys be careful what we sign after that."

I said, "I have got a family, and I need my job back." [117]

And he said, "You boys be careful what kind of paper you sign after this." That is what he told me when I first asked him for the job.

Q. That was when you first asked him for your job back? A. Yes.

Q. He said, "You will be careful what you sign after this"? A. Yes, sir.

Q. Have you applied for any work since that time?

A. Yes, sir, two times. That is when I got the recommendation, the last time I was over at the plant.

Q. Are you now employed? A. No, sir.

Q. Would you be willing to accept your job back

(Testimony of Sylvester Osborne.)

from Respondent in the event that the National Labor Relations Board would order Respondent to reinstate you? A. Yes, sir.

Q. Did you ever talk with any of the plant foremen about the union?

A. No, sir, I didn't.

Mr. Mauritsen: You may inquire.

Cross Examination

Q. (By Mr. Howlett) Did you attend all three of the meetings that were held by the union?

A. I attended two of them.

Q. The first two? [118]

A. The first one and that one in the pool room they are talking about.

Q. That first meeting was a large meeting, was it not? A. It wasn't so large.

Q. How many would you say?

A. I couldn't say just how many there were; quite a few.

Q. Do you have any idea about the number that were there?

A. Maybe 50 or 60, something like that. I never counted them.

Q. Then the third meeting, was that a very large meeting?

A. Well, the pool room was small. I couldn't say how many were there.

Q. Would you say more than in the first meeting? A. Well, there were as many, anyway.

(Testimony of Sylvester Osborne.)

Q. There was no reason given at the time you applied for reinstatement as to why you were not returned?

A. He never gave me no reason at all.

Q. Did you ask him for any?

A. He says he didn't have any. The recommendation shows that there wasn't any reason why he shouldn't give me my job back. He says he didn't have nothing against my work.

Q. You made a statement here a moment ago about being careful what you said. I didn't hear all of it.

A. He said, "You boys will be careful what you sign after this." [119]

Q. Who said that? A. Mr. Bodine.

Q. When was that?

A. That was when I first went back for the job.

Q. Have you any idea what date that was?

A. That was when the boys went back and asked for their jobs.

Q. Was it long after——

A. Well, it was just after the strike was called off; if you know what date that was.

Q. It was in June.

A. Well, I didn't think about the date.

Q. Was it shortly after the strike had been called off? A. The next morning.

Q. The following morning? A. Yes.

[120]

(Testimony of Sylvester Osborne.)

Q. (By Mr. Gately) I would like to know what it was with reference to that you would be careful of what you signed. Were you in the custom of signing something and had signed the wrong thing?

A. Them cards in the union the same night.

Mr. Howlett: Same objection.

Trial Examiner Stephenson: We will let that stand.

The Witness: I suppose that was what it was.

Trial Examiner Stephenson: That clears it up.

The Witness: I never asked what it was. It was none of my business. [121]

LESTER C. HAZLETON,

called as a witness by and on behalf of the Labor Board, having been first duly sworn, testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: Lester C. Hazleton.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Hazleton, have you ever been employed by the respondent company? A. Yes, sir.

Q. Do you recall on what date you started to work for the [123] company?

(Testimony of Lester C. Hazleton.)

A. On the 8th of December, 1929.

Q. 1929? A. Yes, sir.

Q. At what time did you stop working for the Respondent? A. June 3rd, 1937.

Q. Were you laid off at that time?

A. Yes.

Q. Did you work continuously from 1929 until June 3, 1937? A. Yes, sir.

Q. At what rate were you paid when you started working for the company?

A. 40 cents an hour.

Q. Did you receive any raises while you were working for the company? A. Yes.

Q. What was your wage rate when you were discharged on June 3, 1937?

A. 52½ cents.

Q. Did you receive the general 2½ cent raise given on June 1st, 1937? A. Yes.

Q. Of what did your work consist while you were working for Respondent?

A. I started in there pushing a wheel barrow and I ended up [123-A] down in the yard emptying sewer pipe kilns.

Q. Did you work in the same crew with Mr. McNutt? A. No, sir.

Q. You worked in a different crew?

A. Yes, sir.

Q. Were there a number of these crews working in the yard?

(Testimony of Lester C. Hazleton.)

A. Yes, sir. There was a sewer pipe kiln, roofing tile kiln, then they had some gangs there loading trucks.

Q. Did you attend the meeting held by the union on June 1st, 1937? A. Yes, sir.

Q. Did you sign an application card at that meeting? A. Yes, sir.

Q. You became a member of the union?

A. Yes, sir.

Q. At the time when you were laid off on June 3rd, 1937, was there anybody working in your same crew who had not been with the company as long as you?

A. Yes, sir; there would be all of them.

Q. In other words, you were the oldest man in the crew? A. Yes, sir.

Q. Do you know of your own knowledge whether there was anyone else in these other crews, doing similar work, who had not been with the company as long as you?

A. In the roofing tile department, yes, there was some. [124]

Q. That hadn't been?

A. That hadn't been on as long as I had.

Q. Now, Mr. Hazleton, I show you Board's Exhibit 4. Is your name on that list attached to the letter? A. Yes, sir.

Q. Your name is on that list? A. Yes, sir.

Q. Now, Mr. Hazleton, you have been with the company for some time.

(Testimony of Lester C. Hazleton.)

Did you ever talk about the union with any of the foremen or supervisors?

A. At one time, yes.

Q. Will you state the occasion?

A. Well, I would say it was along about the first of May.

Q. 1937?

A. Yes; first of May, 1937. Mr. Bodine came around to me and he called me off to one side, and he told me that he thought maybe the union would come in there, and if it did, there wouldn't be no chance for the bonus for Christmas like there was last year. Last year was the only other time we had a bonus for Christmas; and he said there wouldn't be no chance if a union came in, for a bonus; and for me to kind of spread it around over the yard among the boys there.

Mr. Howlett: What were you doing at the time?

The Witness: I was hauling brick, setting a new tunnel [125] kiln. I was unloading the wagons that the truck driver was hauling up.

Q. (By Mr. Mauritsen) Do you know about what time it was?

A. About 10:00 o'clock in the morning.

Q. About 10:00 o'clock in the morning?

A. Yes.

Q. You have been with the company since 1929?

A. Yes, sir.

(Testimony of Lester C. Hazleton.)

Q. During the period of your employment how many bonuses did you receive?

A. One; that is in 1936.

Q. The one that was paid in 1936?

A. Yes, sir.

Q. What part of 1936?

A. Well, let's see: We got it on about the 18th of December, 1936.

Q. Then on approximately May 1st Mr. Bodine told you that if the union came into the plant that the men would not get another bonus?

A. Yes.

Q. And you understood that he was referring to this bonus paid the previous year?

A. Yes, sir, he said, "In case the union comes in here, there won't be no chance for a bonus this coming year like there was last year." [126]

Q. And did you testify that he told you to spread that word around among the men?

A. Yes; kind of tell some of the boys, or when there was a meeting, or anything, to get up and make a speech like that.

Q. This was Mr. Bodine, the plant superintendent, that told you this? A. Yes.

Q. Were you at the meeting on June 1st?

A. Yes, sir.

Q. Did you get up and make a speech telling the boys what would happen if they joined the union? A. No, sir, I didn't.

(Testimony of Lester C. Hazleton.)

Q. You didn't carry out Mr. Bodine's instructions?

A. No; although he told me that I didn't need to say anything about who told me that, or anything.

Q. He didn't want it known?

A. Yes, that was it.

Q. Who laid you off on June 3rd?

A. Harry Gantz.

Q. Harry Gantz. Was he the Harry Gantz who was present at the meeting on June 1st?

A. Yes, sir.

Q. Did he give any reason for your lay-off at that time?

A. He says on account of business being so slack that he guessed he wouldn't need me any more.

[127]

Q. Did he tell you it was a permanent lay-off or a temporary lay-off? A. He didn't say.

Q. Other witnesses have testified that a notice was posted on June 2nd on the time clock, is that true? A. Yes, sir.

Q. Did you see the notice? A. Yes, sir.

Q. What did that notice say?

A. It stated on account of business being so slack that there had to be a general lay-off.

Q. But the company had just given a general raise in pay?

A. Yes, they gave us a raise in pay on the 1st.

(Testimony of Lester C. Hazleton.)

Q. Mr. Hazleton, has it been your experience with the company that raises in pay are given when the business is slack?

Mr. Howlett: Just a minute. We object to that as calling for a conclusion of the witness.

Trial Examiner Stephenson: He may answer. Objection overruled.

Mr. Howlett: Also on the ground that no proper foundation has been laid.

Trial Examiner Stephenson: Objection overruled.

The Witness: What was that question?

Trial Examiner Stephenson: Will you read the question?

(The last question was read by the reporter as set forth [128]

A. Well, there was one crew that worked pretty steady. That was the sewer pipe——where they make the sewer pipe.

Q. But in the other departments they worked several days and then were off for a while, then came back to work, is that right?

A. Well, they would work maybe a couple of hours a day——come out and load a truck, then they would go back home, then they might show up next morning and maybe work all day that day. It was just according to what they had to do.

Q. But it was only one crew that worked steady?

A. Yes. They worked quite steady.

(Testimony of Lester C. Hazleton.)

Q. And the rest of you worked intermittently?

A. Yes.

Mr. Mauritsen: You may inquire.

Cross Examination

Q. (By Mr. Howlett) You were speaking of this spread work; that was in 1932?

A. Well, it was in the worst part of the depression.

Q. 1929 and 1930?

A. I should say it was along in 1932.

Q. 1932. And all this testimony you have given about your experience that you have just testified, was in 1932 and prior thereto?

A. Well, that is when the worst of it was, yes.

Q. You attended the meeting on June 1st, you testified? [130] A. Yes, sir.

Q. How many men were there there at that time?

A. Well, I wouldn't say just exactly. I would say 50 or 60; something like that.

Q. Did you attend any other meetings?

A. Yes, sir.

Q. Was there a larger number at any of them?

A. Yes. The second meeting there was a larger crowd, I believe. I wouldn't say just how many there was.

Q. Mostly employees from the L. A. Brick?

A. Yes. They were all employees at that second meeting, except one.

(Testimony of Lester C. Hazleton.)

Q. What has been your work for the past year?

A. Well, I have been in the yard, emptying sewer pipe kilns, up until June 3rd.

Q. And what did you do when emptying those kilns?

A. Well, it is to pile the sewer pipe up. There was four fellows working in the kiln and there was two in the yard; and they loaded them on the wagon and the truck driver brings them down to the yard and distributes them down there where they go; and I and another fellow was down there and would sort them and pile them up. [131]

Q. Did you have any complaints from your employer at any time about that defective pipe going through without being rejected?

A. Well, once or twice one would send down one kind of an order, and another would send down another kind.

Q. I am speaking now of the defective pipe.

A. Yes.

Q. What kind of an order are you referring to?

A. One would send down an order to sort them one way and to put in a certain kind, and I would put in that certain kind; another one would come down and tell me to put in another kind. [133]

Q. Well, who knew about any of those pipe getting through after you inspected them?

A. Either the foreman or Mr. Bodine.

Q. Who was the foreman?

(Testimony of Lester C. Hazleton.)

A. Harry Gantz.

Q. Were you ever notified, after rejection by a customer of defective pipe?

A. Once or twice they did. Maybe they would just be talking and just tell me.

Q. And what did they say to you?

A. Well, they wouldn't come right out and tell me, but they would say, "So-and-so found a few bad pipe in that last lot of sewer pipe that went out," and wanted me to see that it was all looked at a little bit better; but very seldom they ever told me anything about that at all.

Q. Do you remember any particular contract where there was a large quantity of this pipe rejected on account of it being defective?

A. No, sir.

Q. You have no recollection of that? [134]

A. No, sir.

Q. When was the last time Mr. Bodine spoke to you about that?

A. It has been at least two years.

Q. He hasn't said a thing since that time?

A. Not about sorting sewer pipe.

Q. Has Mr. Gantz said anything to you since that time? A. No.

Q. Has anyone else in the company said anything to you since that time? A. No.

Q. So you haven't had any complaints since that time? A. No.

(Testimony of Lester C. Hazleton.)

Q. Have you applied for work since you left?

A. No, sir. They told me to get my time the next morning, so I didn't figure there was much use going back.

Q. You never asked them then? A. No.

Q. Do you know, as a matter of fact, that quite a number of men that went out the same time you did are back?

A. Well, I don't know about the same time I did, but there are several of them back that went out on strike.

Q. But you don't know the number?

A. No. I never have had a chance to see the cards around the office to check on it.

Q. You say on May 1st, 1937, you had a conversation with [135] Mr. Bodine?

A. Yes, sir.

Q. Who was present beside Mr. Bodine?

A. Just by ourselves.

Q. Where were you at that time?

A. Well, we were right by the office. We was unloading brick. I guess it was about ten feet from the office. He called me off to one side.

Q. He called you over? A. Yes.

Q. What did he say to you first?

A. Well, he told me, "I guess you have heard about the union?" That there was a lot of union talk around Los Angeles and some of the companies up there had signed for it, and he said maybe it

(Testimony of Lester C. Hazleton.)

would come down that way, and if it did, he told me to use my own judgment about signing up for it.

Q. That you could use your own judgment as to what you did?

A. Yes; and he told me, "In case a union does come in, there won't be no chance for a bonus this year."

Q. Have you and Mr. Bodine been friendly for a period of time?

A. Well, we seemed to be friends for the last seven years, I guess, that I have worked with him.

Q. Did you notice that there was slack time coming on there at the time you left? [136]

A. I didn't notice any, no.

Q. You wouldn't know about the orders being taken at the time for the goods to be produced thereafter, I presume?

A. Not exactly, no; but we had been working every day; mostly Saturdays and Sundays, too, and overtime.

Q. And at times you may be laying ahead getting up orders for stock, is that correct?

A. Yes, but most of the time, it has just been the last two or three months——well, two or three months before I was laid off that we got any pipe in the yard at all. Usually it was going out as fast as we put it in.

Q. Did you stock some at the yard?

A. At the Alberhill plant they got started getting ahead a little bit when I was laid off there.

(Testimony of Lester C. Hazleton.)

Q. Yes.

A. But usually everything was taken out just as fast as we put it in there.

Q. Up to that time?

A. Yes. Several times they didn't have enough pipe to fill the orders.

Q. That was prior to the time of the lay-off?

A. Yes. [137]

Recross Examination

Q. (By Mr. Gately) Did you ever get a pay cut while you were there; have your wages reduced?

A. Yes.

Q. You have busy seasons and slack seasons there? A. Yes.

Q. What is the usual custom in those slack seasons? Did they lay you off in wholesale groups, or did they just let the men come around and get a couple of hours?

A. They would let them come around and get what time they could.

Q. But there was no general lay-off?

A. No.

Q. When you got these other pay raises did they raise you one day and then lay you off two days later? A. No.

Q. That never happened before? A. No.

Q. Do you know how many that were laid off prior to the strike have been returned to work, if any?

A. I couldn't say as to that. [138]

(Testimony of Lester C. Hazleton.)

Q. You personally don't know anybody that was laid off prior to the strike that has been returned to work since?

A. Well, I know some of them went back to work since they signed up for the union, if that is what you mean.

Q. I mean the men who have been laid off before the strike was called?

A. Yes, there was some went back to work.

Q. There was? A. Yes.

Q. You don't know how many?

A. No, I don't know how many.

Mr. Gately: That's all.

Trial Examiner Stephenson: Any further questions?

Q. (By Mr. Howlett) Just one question. Mr. Hazleton, all this experience you have related here about your experience in lay-offs, was in the period of five years prior to the time you are now testifying about? A. Yes.

Q. You are working on a turkey ranch now, are you?

A. Yes, sir. [139]

Recross Examination [142]

Redirect Examination [143]

Q. (By Mr. Mauritsen) Mr. Hazleton, if the Board should order your reinstatement with the payment of wages which you would have earned,

(Testimony of Lester C. Hazleton.)

would you be willing to accept the reinstatement with the company? A. Yes.

Trial Examiner Stephenson: Mr. Mauritsen, I don't believe that question was asked of Mr. McNutt.

If there is no objection I suppose that question can be asked him from where he sits right now.

Mr. Mauritsen: I was intending to bring him back later.

Trial Examiner Stephenson: All right.

Mr. Mauritsen: Or we may as well have the record show it now. He can be considered as still under oath.

Trial Examiner Stephenson: Yes, he is under oath.

Q. (By Mr. Mauritsen) Mr. McNutt, if the Board should order your reinstatement with payment of wages from June 3rd to the time of your re-employment, would you be willing to [144] accept that employment?

Mr. McNutt: I would be mighty glad to have that job back—any job.

HENRY BOONTJER

called as a witness by and on behalf of the Labor Board, having been first duly sworn, testified as follows:

(Testimony of Henry Boontjer.)

Trial Examiner Stephenson: State your name, please?

The Witness: Henry Boontjer.

Trial Examiner Stephenson: How do you spell that?

The Witness: B-o-o-n-t-j-e-r.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Boontjer, have you ever been employed by respondent company?

A. Yes, I have.

Q. At what time did you start to work for respondent company?

A. April 8, 1937.

Q. 1937? A. Yes.

Q. What work did you do for respondent?

A. Drawing kilns; roofing tile kilns.

Q. Was that work similar to the work done by Mr. McNutt and Mr. Hazleton? [145]

A. I worked with Mr. McNutt full time.

Q. You worked in the same crew?

A. I worked with him all the time. We worked together.

Q. Did you start at 40 cents an hour?

A. Yes.

Q. Did you receive any raises while you were in the employ of Respondent? A. 2½ cents.

Q. Was that the general raise on June 1st?

A. Yes, sir.

(Testimony of Henry Boontjer.)

Q. Did you ever receive any complaints regarding your work?

A. When I started I probably was a little green at some things they told me and I learned as fast as I could, and I was doing all right. I suppose everybody has got to learn.

Q. Surely. What was the first union meeting that you attended? A. June 5, 1937.

Q. 1937? A. Yes.

Q. Did you apply for membership in the union at that time?

A. Yes; I joined and paid up.

Q. You signed the application card and paid your dues? A. Yes, sir.

Q. When did your employment cease with Respondent? A. When? [146]

Q. Yes. A. June 8, 1937.

Q. And you had joined the union on June 5, 1937? A. Yes.

Q. Who laid you off? A. Harry Gantz.

Q. Did he give any reason for your lay-off?

A. Oh, he says the same thing as the rest of the fellows, I guess.

Trial Examiner Stephenson: A little louder, please.

A. The same as the rest of the fellows that got laid off.

Q. Did you attend the union meeting after the time when you were laid off?

(Testimony of Henry Boontjer.)

A. Yes. I guess that one in the pool hall there when that letter they took to them about—

Q. This letter? I am showing you Board's Exhibit 3. Is that the letter to which you are referring? A. Yes.

Q. You were present at the meeting at which that was drafted? A. Yes.

Q. Was the vote taken of the members present regarding the approval of this letter? A. Yes.

Q. Did you vote in favor of the sending of this letter? [147] A. Yes.

Q. Did you ever apply for work after the strike had been called off?

A. I went to see Art at his house. I heard they was hiring men back and I went to Art Bodine's house and he said they was pretty well—I said I heard they was hiring, and he said there was no use for a new man there.

Q. Do you recall about what time or what the date was on which you applied for re-employment?

A. Oh, it was right after—between the 1st and 15th of August.

Q. Between the 1st and 15th of August?

A. Or July, I guess it was.

Q. The 1st and 15th of July. A. Of July.

Q. That would be two or three weeks after?

A. Yes. It was right after the strike.

Q. Within two or three weeks after the strike had been called off? A. Not over a month.

(Testimony of Henry Boontjer.)

Mr. Mauritsen: Now, Mr. Examiner, I should like to move at this time to include in the complaint the name of the witness I have just been examining.

At the time when the complaint was drafted it appeared that Mr. Boontjer would not be present and would not be avail- [148] able, and for that reason his name wasn't included. However, since he is one of the employees who joined the union and was laid off, the Board feels that his name should be added to the complaint; both appendix, both A and B at this time.

Trial Examiner Stephenson: You so move that the complaint be amended?

Mr. Mauritsen: Yes.

Trial Examiner Stephenson: Any objection?

Mr. Howlett: Yes. I object at this time to bringing a new party into the action.

Trial Examiner Stephenson: The objection will be overruled. The complaint will be amended.

(Discussion off the record.)

Cross Examination

Q. Are you working now? A. Yes. [149]

Q. Where are you working?

A. I am working—well, I am making tools; screw drivers and chisels; working at Elsinor.

Q. You stated that Mr. Bodine, at the time you went to see him, said, "There was no use; we are not putting on any new men." Is that what he said to you? A. "Not putting any more men on."

(Testimony of Henry Boontjer.)

Q. "Not putting any more men on"?

A. Yes.

Q. So it wasn't new men?

A. No, I wasn't a new man.

Q. You were a new man yourself?

A. I worked there before.

Q. That is what I asked you a minute ago.

A. Yes.

Q. When did you work there before?

A. Before June 8th.

Q. That is the only time you worked there, between April 8th and June 8th, 1937? A. Yes.

Q. Then you stated that Mr. Gantz said, "Your being laid off is the same as the rest of the lay-offs"? A. Yes.

Q. And he referred to quite a number of men who were being laid off at that time? [150]

A. That there was a slack season there.

Q. Lack of season? A. Slack season.

Q. Slack season? A. Yes.

Q. And you knew what he meant by that?

A. Yes.

Mr. Howlett: That is all.

Trial Examiner Stephenson: Anything further?

Redirect Examination

Q. (By Mr. Mauritsen) If the Board should order your reinstatement with the back payment of wages from the time of your lay-off, would you accept reinstatement in the Respondent's employ?

(Testimony of Henry Boontjer.)

A. I would.

Trial Examiner Stephenson: Any further questions?

Recross Examination

Q. (By Mr. Howlett) You understood from Mr. Bodine, he meant the reason he was not putting you back was on account of lack of work? Is that the idea you received from him?

A. I wouldn't know.

Q. That is what he said to you?

A. Yes, but I don't know. I like to have a smile from the boss always, and he never cracked a smile to me or talked to me. [151]

Q. When business is bad, smiles are few and far between sometimes.

Redirect Examination

Q. (By Mr. Mauritsen) Why did you apply for work between July 1st and July 15th?

A. Well, I figured I was making practically just a living where I was, and the man I was working for said if I could make more money in the brickyard, I should apply.

Q. Did you know of any men who had been rehired during that period?

A. Yes. They kept telling me they was rehiring men and said I should try to get back on, and I enjoyed working there as long as I worked there. I never had a bit of trouble, and that is the reason I would like to have gone back. [152]

THOMAS A. RODDY

called as a witness on behalf of the Labor Board, being first duly sworn, testified as follows:

Trial Examiner Stephenson: State your name?

The Witness: Thomas A. Roddy.

Trial Examiner Stephenson: How do you spell your last name? The Witness: R-o-d-d-y.

Direct Examination

Q. (By Mr. Mauritsen) Have you ever worked for the L. A. Brick & Clay Products Company?

A. Yes.

Q. When did you start to work for that company? A. On or about January 1st, 1937.

Q. And in what capacity were you employed by the company? A. General laborer.

Q. At what wage rate were you paid at the start of your employment? A. 40 cents per hour.

Q. Did you receive any wage increases?

A. Yes, sir.

Q. Do you recall on what occasions you received a wage in- [154] crease; about what time?

A. I can't recall the date, but it wasn't so long until we received the 45 cents.

Q. Then did you receive any further wage increase?

A. I believe so. About June 1st, I believe, was when we received the 47½ cents.

Q. The general raise? A. Yes.

Q. Did you work in any other capacity than as general laborer for the company?

(Testimony of Thomas A. Roddy.)

A. Well, most of the work that I performed was conveying clay to the dry pans. I did more of that than any other one task, but, however, I have worked at other labor; whatever they might call me for.

Q. But you were employed principally in conveying clay to the dry pans? A. Yes, sir.

Q. Did you attend the union meeting held June 1st? A. Yes.

Q. Did you sign an aplication for membership in the union at that time? A. Yes, sir.

Q. Did you see Mr. Bodine at that meeting?

A. Yes, sir.

Q. Did you see Mr. Mills? [155]

A. Yes, sir.

Q. Did you see Mr. Gantz? A. Yes, sir.

Q. Did you see Mr. Baer?

A. Yes, sir, I saw Mr. Baer. He was present.

Q. When did your work for the company cease?

A. June 3rd, I believe.

Q. Who laid you off at that time?

A. Mr. Baer.

Q. Mr. Baer? A. Yes.

Q. Did he say you were discharged or that you were laid off. A. He told me I was laid off.

Q. Did he give you any reason?

A. Nothing more than he said I was—that I hadn't been working so long as—in other words, just according to seniority, as I had been there a shorter time than lots of the others and he would have to lay me off according to seniority.

(Testimony of Thomas A. Roddy.)

Q. Did you attend the union meetings after the meeting held June 1st?

A. Yes, sir. I attended some of them.

Q. Were you at the meeting of June 5th, when officers were elected?

A. At the Townsend Hall, yes, sir.

Q. You voted for the officers of the union? [156]

A. Yes, sir.

Q. Were you at the meeting of June 9, 1937?

A. Well—

Trial Examiner Stephenson: Tell him where the meeting was held.

Q. (By Mr. Mauritsen) In the pool hall?

A. At the pool hall?

Trial Examiner Stephenson: I wanted to identify it for the witness.

The Witness: I was at that meeting, but I can't recall the date.

Trial Examiner Stephenson: But you were at the meeting in the pool hall?

The Witness: Yes, sir, I was there.

Q. (By Mr. Mauritsen) At that meeting in the pool hall was this petition, which is marked Board's Exhibit 2, presented for consideration?

A. Yes, sir. I voted for that.

Q. You voted for it. That was considered at that meeting? A. Yes, sir.

. Did you appear on the picket line during the strike? A. Yes, sir.

(Testimony of Thomas A. Roddy.)

Q. Did you see any of the company foremen or officials while you were on the picket line?

A. Well, I have seen them coming to and from the plant. [157]

Q. Because of your presence, they had opportunity to see you on the picket line, did they not?

A. Yes, sir.

Q. Did you apply for reinstatement after the strike was called off? A. Yes, sir.

Q. What was the first occasion on which you applied for reinstatement?

A. Well, I can't recall the date, but it was some time after the strike was called off. When it was settled I went to Mr. Bodine's house one afternoon and asked him for employment and he said he couldn't give me any encouragement at that time; that he had nothing that he could offer me.

Q. You say that was after the strike was called off. Do you recall how soon after?

A. No, sir, I can't recall. I didn't keep any record of dates.

Q. Would you say it was within two weeks after the strike was called off?

A. Well, it was something like that; possibly three weeks.

Q. Did you apply for reinstatement after that?

A. Yes, sir.

Q. Did you receive employment?

A. No, sir.

Q. How many times in all did you apply for reinstatement? [158]

(Testimony of Thomas A. Roddy.)

A. Three times, I believe.

Q. Three times, and at no time, or on none of those occasions were you offered to be re-employed?

A. No.

Mr. Mauritsen: That is all.

Cross Examination

Q. (By Mr. Howlett) You only worked for the company for about six months at the time you were laid off, is that correct?

A. Well, approximately.

Q. Five months?

A. January 1st to June 3rd.

Q. You had no difficulty with the company while you were working there? A. None whatever.

Q. You have no hard feeling toward the company at the present time, have you?

A. No, sir. [159]

Q. (By Mr. Howlett) You were on the picket line for some time during this difficulty you were having?

A. Well, I was there sometimes; not every day.

Q. But you were there part of the time?

A. I was there part of the time.

Q. And you knew some of the men that were on the line? [162] A. Yes.

Q. Isn't it a fact that a number of those men are now working with the company, that were on the picket line?

A. Yes, there are some there; yes, sir.

GREGORIO CORDERO

called as a witness on behalf of the Labor Board, having been [163] first duly sworn, testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: Gregorio Cordero.

Trial Examiner Stephenson: Will you spell that.

The Witness: G-r-e-g-o-r-i-o C-o-r-d-e-r-o.

Direct Examination

Q. (By Mr. Mauritsen) Now, Mr. Cordero, have you ever been employed by the L. A. Brick & Clay Products Company? A. Yes.

Q. When did you start to work for this company? A. April 17, 1937.

Q. April 17, 1937? A. Yes.

Q. What wage did the company pay you at that time? A. 40 cents an hour.

Q. 40 cents an hour? A. Yes.

Q. Did you receive any raise in pay while you were working for the company?

A. After 60 days, yes.

Q. After 60 days. How much?

A. 47½ cents an hour. I received that much.

Q. What work did you do while you were working for them?

A. I worked in the yard loading trucks. Sometimes I worked on the pipe setters gang; sometimes I worked with the brick [164] setters; and most of the time I worked in the yard loading trucks.

Q. Loading trucks? A. Yes.

(Testimony of Gregorio Cordero.)

Q. Mr. Cordero, did you attend the union meeting held June 1st? A. Yes.

Q. Did you see Mr. Bodine at that meeting?

A. Yes.

Q. When did your employment with the company end? A. What do you mean?

Q. When were you laid off by the company?

A. June 3rd.

Q. Who laid you off? A. Harry Gantz.

Q. Harry Gantz? A. Yes.

Q. What did he say to you at that time?

A. Well, he told me that they have to lay off some men; I was one of the new men that was hired, so I would have to be laid off; he would be very glad when business picked up to put me back to work.

Q. In other words, that you would be reemployed at a later date?

A. Yes, and he gave me a letter for recommendation. I [165] have got it here.

Q. In other words, you hadn't received any complaints regarding your work?

A. No, not at all.

Q. So far as you knew, your work was entirely satisfactory to the company? A. Yes.

Q. Did you join the union on June 1st?

A. Yes, I did.

Q. Did you sign an application for membership?

A. Yes.

Q. Did you attend the meeting June 5th, 1937?

(Testimony of Gregorio Cordero.)

A. Yes, I did.

Q. That was the meeting at which the officers were elected? A. Yes.

Q. Did you attend the meeting on June 9 in the pool hall? A. No.

Q. You didn't attend that meeting? A. No.

Q. After the strike was called off, did you apply for work? A. Yes.

Q. To whom did you apply?

A. To Mr. Bodine.

Q. Do you recall about what time that was?

A. About 7:30 in the morning. [166]

Q. On what date? A. On April 1st.

Q. On what?

A. I don't remember. I guess about the first of April—July; 1st of July.

Q. 1st of July? A. Yes.

Q. What did Mr. Bodine say to you at that time?

A. Well, he didn't say anything to me for two or three days, and then he said, "That's all boys; we haven't got nothing today."

Q. You didn't get to speak to Mr. Bodine the first time you applied? A. No, I didn't.

Q. He just said, "That's all"?

A. Yes. I went home and came back the next day.

Q. Then when did you apply the next time after the 1st of July?

(Testimony of Gregorio Cordero.)

A. He told me to come about five or six days; and one day Mr. Bodine pulled me and one or two boys aside, and he told me he was afraid he would have to put off the work because they have some reports that I was making a lot of trouble in the case of the union; that I was making a lot of trouble with the boys there, and that was the reason he didn't want to put me to work again; that there was nothing the matter [167] with my work, but that was the reason he didn't want to put me to work.

Q. Did I understand you to testify that he said you were making trouble in regard to the union?

A. Yes.

Q. Then what did you reply to that?

A. Well, I was working on the Alpha Veda Store when the strike was on, then I went to the boss and asked him for a letter so I can bring proof to Mr. Bodine that I was working every day at the time the strike was on, and then I get the letter and bring it over to Mr. Bodine at the machine shop. I was over there and I go down and take it to him, and he told me to come back the next day, and the next day he put me back to work. [168]

Q. He said to you he couldn't hire you because you had been causing trouble among the boys in respect to the union? A. That is it.

Q. Then you brought this letter from the manager of the Alpha Veda Store? A. Yes.

Q. Stating that you had been working at the time of the strike? A. Yes.

(Testimony of Gregorio Cordero.)

Q. And then Mr. Bodine re-employed you?

A. Yes.

Q. He gave you your job back? A. Yes.

Q. How long did you work there after you were reinstated?

A. Well, I worked there about a month and a half after that. [169]

Q. About a month and a half? A. Yes. [170]

Q. What happened the day after Mr. Gantz laid you off the last time?

A. I don't remember exactly what happened.

Q. Did you have any argument with any worker on that day?

A. Well, no. I was working all right with a fellow that was there. We had no argument; just a complaint that work, like piece work, and I guess somebody told the boss that I said they was working us too hard; and that is why I guess they laid me off, because I told the fellow they was working us too hard.

Mr. Mauritsen: That is all.

Cross Examination

Q. (By Mr. Howlett) Mr. Cordero, you came to work on April 17 and were laid off on June 3rd?

A. Yes.

Q. That is the only time you ever worked for the company? A. Yes.

Q. Where did you work before you came there?

A. Working at Davidson Brick Company, Los Angeles.

(Testimony of Gregorio Cordero.)

Q. You were at this meeting June 1st, were you?

A. Yes, sir.

Q. Were there very many men there that night?

A. I guess about 50 or 55 men.

Q. Were you on the picket line?

A. I wasn't there but about 20 minutes one day. I left to [171] go to work at 7:00, and I had been there since about 6:20 or 6:30.

Q. And you got a job at the Alpha Veda Store?

A. Yes, I was working there plastering.

Q. That is a grocery store?

A. They was building a new store.

Q. When did you first go down to talk to Mr. Bodine?

A. After they finished working on that store. I don't know for sure exactly, but I think it was the 1st of July.

Q. At that time he told you there was no work?

A. He didn't tell me exactly. There was quite a few working. He said, "That's all, boys."

Q. Did he say anything about your having worked there for a short time?

A. No, he didn't say anything about that.

Q. Then you went back again after that, did you? A. Yes.

Q. What did he say about being afraid you would make trouble or had been making trouble?

A. Yes. He said somebody had made reports about me and my brother and another fellow.

Q. Did he say who they had been made to?

(Testimony of Gregorio Cordero.)

A. No.

Q. Did he say who made them? A. No. [172]

Q. There was no truth in that, was there?

A. No, because I bring the letter to prove I was working.

Q. So there wasn't any truth in the report that you had been making trouble? A. No. [173]

Q. I see. What work did you do then?

A. On the pipe setting gang.

Q. Who were you working with?

A. Setters.

Q. How many were there?

A. There were four in the kiln and three hauling pipe.

Q. Did you have any argument about any of the work you were doing? A. No.

Q. No dissatisfaction among the employees there about anything? A. No.

Q. Then the next time you heard from somebody in connection with the company, when was that?

A. Do you mean the day they lay me off?

Q. Yes.

A. They say they going to lay me off because somebody make a report on me again that I was making trouble again.

Q. When did you first hear that? Who did you hear it from?

A. From Mr. Gantz, the foreman.

(Testimony of Gregorio Cordero.)

Q. He told you that somebody had made this report? A. Yes. [174]

Q. Did he question you about it?

A. He didn't question me, no. He told me he would have to lay me off again. He told me he would see if he could do something for me later.

Q. Who was there at the time this conversation took place? A. Nobody else.

Q. Did he come out to see you?

A. No, he called me.

Q. You came in to see him? A. Yes.

Q. Are you working now? A. No.

Q. Have you worked since that time?

A. No. I was getting help from the relief. [175]

Redirect Examination

Q. (By Mr. Mauritsen) Mr. Cordero, if the Board should order your reinstatement with the company and order that the [177] company pay you back pay from the time you were laid off the last time, would you be willing to accept employment from the company?

A. I would be very glad to. [178]

Trial Examiner Stephenson: Will it be stipulated that the meeting in Dr. Nylander's office, heretofore testified to by various witnesses, was held on the 15th day of June, 1937?

Mr. Howlett: It is so stipulated.

Mr. Mauritsen: So stipulated.

Trial Examiner Stephenson: Mr. Gately, will you stipulate to that also?

Mr. Gately: Yes.

Trial Examiner Stephenson: All right.

Mr. Mauritsen: I should like at this time to call William G. Ashworth.

Trial Examiner Stephenson: Come forward, Mr. Ashworth.

WILLIAM G. ASHWORTH

called as a witness for and on behalf of the Labor Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name. [180]

The Witness: William G. Ashworth.

Trial Examiner Stephenson: Just sit down, Mr. Ashworth.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Ashworth, have you ever been employed by respondent company?

A. Yes, sir. I started in my employ there October 8, 1935, and continued until the 8th of June, 1937.

Q. While you were employed by Respondent, of what did your work consist?

A. I worked in what is known as the yard crew; on different crews in the yard; the yard gang you might say. The work was—there was one crew, a sewer pipe drawing crew; one crew that was the tile

(Testimony of William G. Ashworth.)

roof and brick drawing crew. I worked part of my time on one of those crews and part of my time on the other.

Q. What was your work when you first started to work for the company?

A. I first started in the tile roof crew; that is drawing—kiln drawing in the tile roof and brick.

Q. Is that removing tile and brick from the kiln after they have been burnt?

A. From the kiln. Removing tile and brick from the kiln after they have been burnt.

Q. What were you doing when you last worked for Respondent?

A. I worked around different jobs and then came back again [181] to the tile roof crew and was working in the tile roof crew drawing burnt tile and brick from the kiln again.

Q. What wage did you receive when you started to work for the company?

A. 37 or 37½ cents; I am not positive. 37½ I believe it was.

Q. Did you ever receive any increase in pay while you were working for Respondent?

A. Yes, sir; I received several increases.

Q. Do you recall these—

A. I can't recall the dates or just the amounts. The first increase was up to 40 cents an hour. I don't remember the date, but I believe it was the first of the year.

Q. The first of the year? A. 1936.

(Testimony of William G. Ashworth.)

Q. 1936? A. I wouldn't be positive.

Q. What were you receiving when you were last employed by the company?

A. My last increase was when they had a general increase in pay of 2½ cents an hour. I received 5 cents increase; that brought me up to 50 cents an hour.

Mr. Gantz, my foreman, came to me on Saturday, the last Saturday in May, that would be May the 29th, and called me out from the kiln—he came to the kiln door and motioned [182] to me to come out and said, "What is your rate of pay?"

I said, "45 cents an hour."

He said, "Then this 2½ cent increase will make you 47½ cents?"

And I said, "Yes" and he said, "Well, being as we are expecting you to be the crew leader and take the lead and keep the job going while I am not around, while I am off in some other place in the yard, we are going to give you on the 1st of June, an increase of 5 cents instead of 2½."

That is why I received the 5 cents instead of the general 2½ cent increase.

Q. Had you ever received any complaints regarding your work?

A. No, sir; I never received any complaints regarding my work, except when I was working in the sewer pipe drawing crew we got called down or balled out a time or two because of the fact that we lost some sewer pipe by the pipe rolling—a com-

(Testimony of William G. Ashworth.)
plaint in that nature that we were blamed for the rolling of the sewer pipe and the damage that ensued. We felt it wasn't our fault exactly; it was more the fault of the poor shape that the kiln floors were in. We always did our best to do our work and work in such a manner in the safest way and in a way to get the material out in the yard in a shape to be sold. Of course, we all make mistakes, and at times our judgment isn't what someone else's judgment would be, but we always did things in the way we thought best. [183]

A. Yes, sir.

Q. Now, Mr. Ashworth, are you a member of the Union? A. Yes, sir.

Q. When did you join the union?

A. June 1st, 1937.

Q. Was that at the first meeting held by the union?

Mr. Howlett: If your Honor please, I object to having the witness read from a document or something that he has in his hand.

Trial Examiner Stephenson: What is that?

The Witness: It is notes I made myself so that I wouldn't forget any point.

Trial Examiner Stephenson: Well, let's put the notes aside, and then if you want to refer to them—

The Witness: The notes were dates and such as that.

Trial Examiner Stephenson: All right. Go ahead.

Mr. Mauritsen: Will you read the question?

(Testimony of William G. Ashworth.)

(The desired question was read by the reporter as set forth above.)

A. That was the first organizational meeting held in the American Legion Hall on June 1st.

Q. Did you sign an application card to join the union at that meeting? A. Yes, sir.

Q. Were Mr. Bodine, Mr. Baer, Mr. Mills and Mr. Gantz [193] present at that meeting?

A. Yes, sir; they were everyone there from the start.

Q. Did you attend the meeting of the union held on June 5th? A. Yes, sir.

Q. Did you participate in the election of officers at that meeting? A. I did.

Q. Now, on what date were you laid off?

A. June 8th, 1937.

Q. Who laid you off? A. Mr. Gantz.

Q. Did he say anything to you about the reason for laying you off at that time?

A. No. Mr. Gantz came in the kiln and said, "I have bad news for two of you fellows," and there had been several layoffs—there had been lay-offs every day since the 2nd up until that night, and naturally, all of us that joined the union were expecting it; and I said, "Me and who else?"

And he said, "Hank."

So really I didn't give him any chance to tell me why. I didn't ask him why because I realized at the rate they were going, we were all getting it sooner or later, and I didn't ask the reason.

(Testimony of William G. Ashworth.)

Q. You referred to somebody as "Hank." Who was that person? Hank who? [194]

A. I can't ever pronounce the boy's name. Boontjer. I believe he was working with us in the kiln.

Trial Examiner Stephenson: Will it be stipulated that the witness refers to Henry Boontjer?

Mr. Howlett: So stipulated.

The Witness: That is the man.

Q. (By Mr. Mauritsen) Had you ever discussed with any of these foremen at the plant about the union?

A. On June 2nd, that was the next day after the first organizational meeting in the Legion Hall at Elsinor, Mr. Gantz and I were sitting in the car eating lunch and we talked of the union practically the whole noon hour. He was trying to argue to me—he told me time and time again through the noon hour that the thing for us to do was to leave all outside affiliations and form an employees' union, with no outside affiliations whatever. In fact, he told us we were fools to allow ourselves to be led by a man such as the organizer was that was sent out there for the meeting on June 1st.

Again on—I wouldn't be positive whether it was the same day or the next day. It couldn't have been later than the next day, the 3rd of June, because Lawrence McNutt was fired on the night of the 3rd of June, so it couldn't have been later than that; it possibly was the second. Mr. Gantz came in the kiln

(Testimony of William G. Ashworth.)

and we were caught up with our work and were [195] standing there talking to him—Lawrence and myself—to Mr. Gantz.

He said, "You fellows are fools to affiliate with the C.I.O. or any outside organization. You should form a union, yourselves, and stay clear of all outside affiliations."

Then, on the evening that I was discharged, going home in the car that evening, Mr. Gantz and I rode in the same bunch back and forth to work. He made the statement, he said, "The mistake you fellows made from the start was joining up with any outside organization whatever." He said, you should have just formed an employee's union here in this one plant and stayed clear of all outside affiliations."

Q. Then you were laid off on the 8th of June, I believe you testified? A. Yes, sir.

Q. Were you present at the union meeting held June 9th? A. Yes, sir.

Q. Where was that meeting held?

A. That was held at Alberhill—or Clayton. At Clayton, rather, at the pool hall.

Q. What took place at that meeting?

A. We had a discussion of what kind of a proposition to offer the company, and formulated an agreement to be presented to the company and a committee was appointed to take one copy of the agreement to the plant and one copy of the [196]

(Testimony of William G. Ashworth.)
agreement to the head office of the L. A. Brick Company on Mission Road, Los Angeles.

Q. Was a vote taken upon the adoption of that petition or agreement? A. Yes, sir.

Q. Was the result announced as being in favor of presenting the petition or agreement?

A. It was unanimous.

Q. And what action was decided upon in the event that the company did not answer the petition or agreement?

A. Well, the question arose what we should do in case the company refused to answer the agreement or to act favorably upon it, and the consensus of opinion was that we should strike, and a secret ballot was taken on the strike.

Q. And what was the result of that ballot?

A. It was voted that in case a favorable return wasn't received on the agreement that we were to call a strike on the morning of June 11 at 7:30, with the provision made that the two burners, Mr. Art Hannum, the burner on the tunnel kiln, and Niles Martinson, the burner on the bee-hive kiln, that they remain on the job, and everyone else called out at 7:30 and a picket line thrown around the plant, but the two burners to remain on the job until the foremen relieved them or until the material in the kiln were in the condition that the fires could be turned out; which was done. [197]

Trial Examiner Stephenson: Mr. Hannum and who was the other?

(Testimony of William G. Ashworth.)

Mr. Mauritsen: I believe that was Mr. Martinson.

Trial Examiner Stephenson: Niles Martinson?

The Witness: Yes.

Trial Examiner Stephenson: Will that be stipulated, gentlemen, that is the name the witness referred to?

Mr. Howlett: Yes.

Q. (By Mr. Mauritsen) Did I understand you to testify that it was agreed that the men would go out on strike on the morning of June 11, but that these burners, as you have designated them, were to remain at work until they were relieved or until the kilns were in the condition that they could be left?

A. Yes, sir.

Q. That was agreed upon?

A. That was agreed upon, and those present at the union were so instructed. The burners were present and instructed.

Q. The burners were present and instructed to that effect? A. Yes, sir.

Q. On June 10, do you know whether the petitions were delivered?

A. I know from hearsay that the one was delivered at the plant.

Mr. Howlett: Just a minute. [198]

Mr. MacLaren: That is all right. We have admitted they were delivered.

Did the employees go out on strike on June 11?

(Testimony of William G. Ashworth.)

A. The whole force stayed out except for about six men.

Q. Do you know of any of the men who stayed in?

A. Bud Smith stayed in, or went through the picket line rather; and Jack Osborne, and Cornell Lyell. I know this other man, but I can't recall his name. He is a brother-in-law of Joiner. He works on the pipe press. And John Hall.

Q. There were only four or six men who remained in the plant——

A. There were either five or six.

Q. ——At the time of the strike?

A. About five or six, yes, sir. [199]

Q. Did the two burners, to whom you have referred, remain in the plant according to the instructions given them?

A. They remained for a short while after 7:30. They weren't out right at 7:30. Mr. Martinsen made his report to Mr. Bodine that he was going out with the rest of us boys and asked him what disposition to make of the kiln; and I think—my understanding was that Mr. Bodine——

Mr. Howlett: Just a minute. We object to it as being hearsay. I think that can be established by other witnesses.

The Witness: Well, they remained in the plant and followed instructions.

(Testimony of William G. Ashworth.)

Q. (By Mr. Mauritsen) You know that they stayed in the plant? A. Yes.

Trial Examiner Stephenson: All of the witness' answer, with the exception that he knew that they stayed in the plant, will be stricken.

And may I caution the witness to listen to the question propounded and try to answer the question that is propounded, and not make any explanation unless it is called for.

The Witness: Yes, sir.

Q. (By Mr. Mauritsen) Now, upon what date was the strike called off?

A. June 25th, 1937.

Q. Were you on the picket line during the duration of the [200] strike?

A. Off and on. Not continuously the whole length of the strike, but off and on. I was there, I should say, about 16 hours a day practically every day.

Q. Did you ever see Mr. Bodine while you were on the picket line?

A. I saw him go in and out of the plant while I was on the picket line, and one day myself and two other men, Mark Damron and Glen Stewart went into the office and I asked Mr. Bodine for a letter of recommendation, which he authorized the timekeeper to write out, and he signed it for me.

Q. This was while the strike was in progress?

A. This was while the strike was in progress. It was on Saturday, June 19.

(Testimony of William G. Ashworth.)

Q. So that Mr. Bodine had opportunity to see that you were on the picket line?

A. He had seen me, or should have seen me several times on the picket line.

Q. Did you see any of the other foremen while you were on the picket line?

A. I saw them as they went in and out of the plant, yes, sir.

Q. So that they had opportunity to see you on the picket line? A. Yes, sir. [201]

Q. After the strike was called off, did you ever apply for employment with the Respondent?

A. On the afternoon of the 25th, the day the strike was called off, I went in with several of the boys. We decided that it would be favorable to go in in a group of at least two or three, and we went in and asked him for re-employment.

Mr. Bodine told me that I knew they had been re-hiring men all week, and I hadn't came in and asked for re-employment and he had instructions from the old man—by the old man he meant Mr. Larson, the general manager—to increase the personnel up to about 90 men, which he had done, and he didn't need any more at that time. In fact, he went on to say, "I think it would be favorable for you boys to forget the Los Angeles Brick Company."

Q. In your opinion, what did he mean by that?

(Testimony of William G. Ashworth.)

Mr. Howlett: Just a minute. I object to it as a conclusion of the witness.

Trial Examiner Stephenson: Well, I am going to let him state what he understood by that reply.

A. My understanding of it was because of the fact that we had affiliated ourselves with the union and had been on the picket line that it would be useless for us to attempt to get employment at the Los Angeles Brick Company any more.

Q. Did you ever apply for work after that time?

A. No. I thought that was positive enough, and I didn't [202] return.

Q. I show you Board's Exhibit 4. Will you tell the Examiner whether your name is attached to the list which is attached to that letter?

A. My name is the 8th one, I believe, on the list. That application—what I understood by your other question——

Trial Examiner Stephenson: He asked you just one question. Is your name attached to Board's Exhibit 4?

The Witness: It is.

Trial Examiner Stephenson: And the answer is "yes."

The Witness: Yes.

Q. (By Mr. Mauritsen) Did you ever talk with any of the members of the union who had returned to work, after the strike was called off?

A. Yes, sir.

(Testimony of William G. Ashworth.)

Q. To whom or with whom did you talk?

A. On or about the——

Trial Examiner Stephenson: Will you read the question to him?

(The question referred to was read by the reporter as set forth above.)

A. I talked with several; Mark Damron for one.

Q. On or about what time or date did you talk with Mr. Damron?

A. It was about the 18th—17th or 18th of July. [203]

Q. Was anyone else present at that time?

A. Glen Stewart was present.

Q. What did Mr. Damron say to you at that time?

A. He told Glen Stewart and I that the reason he had not attended the meetings of the union was because of the fact that when he returned to work, that he had positive instructions that any time he was caught attending or having anything to do with the union, he would lose his job. [204]

Q. Did Mr. Damron say who gave him those instructions. A. Mr. Bodine.

Q. Is he the plant superintendent?

A. The plant superintendent.

Mr. Mauritsen: You may inquire.

Cross Examination

Q. (By Mr. Howlett) The first meeting you attended of the union was on June 1st, you testified?

(Testimony of William G. Ashworth.)

A. Yes.

Q. And how many were there at that meeting?

A. Well, approximately 70, I would say.

Q. About 70? A. Yes.

Q. What time did the meeting start?

A. I believe it was 8:00 o'clock.

Q. 8:00 o'clock?

A. 8:00 p.m. It may have been 7:30. 7:30 or 8:00 o'clock. I wouldn't be positive.

Q. Was Mr. McNutt there? A. Yes, sir.

Q. Who had charge of the meeting?

A. Walter J. Greene, the organizer sent out by the Southern California Clay Products.

Q. Did you participate in the meeting other than being present? [205]

A. Nothing except the signing of an application card at the close of the meeting. [206]

Q. All right. Going over to the June 9th meeting, now. What did you discuss at that meeting?

A. We discussed what would be best to ask the company, and there were several different propositions proposed, but the one that was finally agreed on—the company had posted a [209] notice on the clock to the effect that—some time on June 2nd they posted that notice that there were going to be some lay-offs due to business recession and lack of orders on hand, and that those that were laid off would be eligible for re-employment. So one of them —I think the first article that we had in our agree-

(Testimony of William G. Ashworth.)

ment was union recognition, and I think the next one was in regard to re-employment of those that had been discharged; if it was a case that it was because of lack of orders and business depression, then to re-hire those men and divide up the work amongst all the employees on a pro rata basis so no one family or one man would stand the brunt of the depression.

Q. Was it your objection to have this work distributed regardless of the number of hours that each man might receive?

A. Well, we felt that it would be more fair to the employees as a whole to divide up the work, rather than to lay off part of the men and let them stand the brunt of the depression and keep on some others.

Q. You mean, even though it might be only a few hours a day?

A. Well, we felt that we were sure of the fact that there was no business depression.

Q. You were satisfied in your own mind that there was no business depression; that this statement made by them was untrue; is that correct? [210]

A. That was our impression.

Q. And you were also satisfied in your own mind that you had been fired because you were in the union? A. That was our opinion.

(Testimony of William G. Ashworth.)

Q. And you base your opinion on the matter of there being no business there, or from what facts?

A. Well, we had been rushed for kilns to set the new material right up until the very last day of the last week in May. The last working day in May, the 29th of May, on Saturday our crew of nine men worked overtime to finish drawing a kiln so that they would have it to set Monday morning, because of the rush of orders for material; and while the material had been moving out all the previous month, except probably the last week—there was always in every month, the last week of the month usually was a slack period for the month, just like in other businesses, as they didn't buy the last few days of the month because of the fact that they didn't want that to go on that month's bill.

Q. That is your opinion?

A. Well, I base that opinion upon the fact that it happened that way practically every month.

Q. It might have happened for some other reason that you wouldn't know about, of course?

A. Well, it is possible I wouldn't.

Q. What was your position with the company? [211]

A. I worked in the kiln drawing crew and helped load trucks. I was what they call a crew leader on our crew while I was in the sewer pipe drawing crew and while I was in the tile crew.

(Testimony of William G. Ashworth.)

Q. Do you know anything about the orders taken and received by the company?

A. All I know about the orders is that it was the duty of the yard crew to do most of the loading of trucks and box cars.

Q. I am speaking now of contracts. If, in other words, the company made a contract for some special work, you wouldn't know anything about it, would you?

A. Not until the order came out and was filled.

Q. And you wouldn't know when that order was to be delivered or anything about the specifications, except when they told you to put out so much?

A. We would know about it when there was a special order; we always knew about it if it was specially made stuff, because we knew when special material was being made and, of course, as far as when it was to be delivered, I didn't know anything about that except by hearsay.

Q. You had no access to the records of the office?

A. No.

Q. And you had no access to the sales division to know what the orders were or how many had been taken the previous week [212] or previous month, or who they went to, until they told you to make up some tile?

A. It usually leaked out, usually through the foreman. He would tell us how many orders he had

(Testimony of William G. Ashworth.)

on hand and how business was going. He would say, "We have got so many orders," usually because of the fact that he was trying to speed us up and get a kiln ready to be set for more material.

Q. In other words, your information came from a leak-out source of some type? A. Yes.

Q. How long have you been in the brick business?

A. That is the only brick yard I have worked in.

Q. And how long did you work there, in months?

A. About 21 months, I guess it would figure out.

Q. 21 months. And all that time you were working in various places out in the yard, and not in the office?

A. No, I didn't work in the office. [213]

Q. Getting back to your lunch again. You were eating lunch together, were you? A. Yes, sir.

Q Who was there with you; you say Mr. Gantz?

A. Mr. Gantz and Cornell Lyle at the start.

Q. Then Lyle left? A. Then Lyle left.

Q. Then the two of you were there together?

A. Yes, sir. [234]

Q. Who opened the conversation on the subject?

A. Well, I can't say as to that.

Q. Had Mr. Gantz always been friendly with you? A. Yes.

Q. You were eating lunch together. Was that a common custom?

(Testimony of William G. Ashworth.)

A. Mr. Gantz and Mr. Lyle and Jack Osborne and John Hall and myself all rode back and forth to work together.

Q. Whose car did you ride in?

A. One week it would be my car, and one week it would be Mr. Gantz'; and after Mr. Hall went to work—Mr. Hall hadn't been working there only a couple of weeks or so when the union started.

Q. How long had you been doing that?

A. Ever since Mr. Gantz had been there; and before he came there, Cornell Lyle and myself had been driving that way?

Q. Then I assume you got well acquainted over that period of time riding back and forth together?

A. Yes.

Q. And knew each other by your first names?

A. Yes, sir.

Q. Did you ever see each other outside of work? Did you go to each other's houses ?

A. No, we didn't go to each other's houses, but we saw each other other than when working; sometimes at the ball game, [235] and sometimes on the street.

Q. So you had a friendly relation existing between the group that you speak of? A. Yes.

Q. About this conversation on this particular day, what were the substantial words he said to you?

A. I couldn't give you his exact words, but it was to this effect; that we were foolish by being

(Testimony of William G. Ashworth.)
led by a man like Mr. Greene, and we should, instead of affiliating with an outside organization, form a union of our own, of employees, just of the Los Angeles Brick Company, and depend on our own efforts, with no outside help, to gain our ends. [236]

Q. (By Mr. Howlett) On June 11, at the time of the strike [242] you said that the whole plant went out with the exception of five or six men?

A. Yes, sir.

Q. That is correct?

A. Well, when I said it went out, I meant that they didn't go in. You have got to be in to go out.

Q. All right. We are not talking about different things, but we are expressing it differently.

So on June 11th no one went in with the exception of five or six? A. Right.

Q. Why didn't they go in? Was there a strike in progress at that time?

A. The strike was called for 7:30 a. m., June 11, 1937, and quite a little before 7:30 we had a picket line at each one of the entrances or approaches to the plant and stopped them coming to work that didn't already belong to the union and know of it, and request them not to go in because of the fact that we were on strike.

Q. And with the exception of two or three men who you have said were permitted to go in to keep the burners going, all the rest of them stayed out?

(Testimony of William G. Ashworth.)

A. They weren't permitted to go in. They were already in on duty.

Q. Again we are talking about the same thing in a different [243] way.

All right. And from that time for some time you were on the picket line?

A. Most of the time. Not all the time. I was home asleep a little of the time.

Q. About 16 hours a day, you testified?

A. I think it would be pretty close to that, on or near the picket line.

Q. Did you ask Mr. Bodine for a letter of recommendation? A. Yes, sir.

Q. And you got it? A. Yes, sir.

Q. You have heard several witnesses testify that they asked Mr. Bodine for letters of recommendation, did you not?

A. I have not. I have only been here this morning and I am the only witness that has testified.

Q. What conversation was held between you and the other people, if any, relative to securing letters of recommendation from the company?

A. I don't know that I ever talked of it except just before I went in, and I told the boys, "I think I will go in and ask Mr. Bodine for a letter of recommendation."

I asked the officer that was on duty there if I would be permitted to go in and he said, "Yes."

(Testimony of William G. Ashworth.)

Q. What was your purpose of getting a letter of recommenda- [244] tion?

A. What is any man's purpose for getting a letter of recommendation?

Mr. Howlett: I move it be stricken.

Trial Examiner Stephenson: The answer may be stricken.

Answer the question.

A. To help to gain a job at another place where I might apply for a job.

Q. Have you used that letter of recommendation so far?

A. No. I have never been requested to show it.

Q. With your state of mind as to your feeling toward the company, was there any question in your mind about getting that letter of recommendation?

A. No. I thought I had always done my work like it should be done. I couldn't see any reason why I shouldn't receive one.

Q. Did you have any other purpose of securing a letter of recommendation, or attempting to secure one, other than for the purpose you have already stated? A. No, sir.

Q. On June 25th you applied for reinstatement?

A. Yes, sir.

Q. And you stated that you went in groups of two. Did you have some conversation?

A. Two or more? Two or three or more. [245]

Q. What was the purpose of that?

(Testimony of William G. Ashworth.)

Mr. Mauritsen: I object to that.

A. We wished to have witnesses.

Trial Examiner Stephenson: Just a moment. There has been an objection interposed.

The Witness: I didn't understand.

Trial Examiner Stephenson: Will you read the question?

(The desired question was read by the reporter as set forth above.)

Trial Examiner Stephenson: You may answer it if you know.

A. We wished to have a witness to the fact of the refusal, if we received a refusal of being rehired.

Q. Well, you didn't answer the question why you went in groups of two.

A. Wasn't my answer an answer to that?

Mr. Howlett: Will you read the question?

(The desired question was read by the reporter as set forth above.)

Q. In other words, you wanted to be able to prove that you had been there and you had been refused? A. Yes, sir.

Q. You had reason to believe that your word might be doubted if you so stated?

A. Well, we had reason to believe that if it ever came to a case of a hearing before the Labor Relations Board, that we [246] might be required to have proof.

(Testimony of William G. Ashworth.)

Q. So that you went in there in groups so that you could prove it by some other witness?

A. Certainly. [247]

A. I can't be positive of the exact date, but I know it was about that time, because Mark Damron told me the night before, when I told him of the meeting—the evening before, when I told him of the meeting, he was out of gasoline and I pushed his car up to the service station——

Q. That was in July?

A. Yes. And the reason why I know is because he said, "This is my first full check since I went back to work."

Q. What conversation did you have with him at that time?

A. I asked him that evening when I pushed his card—I asked him to come to the meeting; and the next day he told Glen and I the reason why he didn't attend the meeting was because—I couldn't be positive of his exact words, but the gist of it was, "Fellows, if I would go down and take part in any meeting, it would mean my job, because that was one thing we received strict orders from Bodine when I received my job back was not to have anything to do with the union."

Mr. Mauritsen: And these were union meetings?

The Witness: And these were union meetings.

Q. (By Mr. Howlett) Where was the meeting held? A. At Corona; at Twin Springs.

(Testimony of William G. Ashworth.)

Q. Who was present at that meeting beside those you have already named? How many people were present?

A. Some *were* around 14 or 15; I can't remember the exact [248] number. There has been too many meetings to remember the exact number present at any one meeting.

If it is permissible I would like to make a statement regarding the attendance of that meeting.

Trial Examiner Stephenson: If there is no objection go ahead and make the statement.

Mr. Howlett: I can't object before I know what it is.

Trial Examiner Stephenson: You make your statement, then if anybody moves to strike it, we will rule on it then.

A. The reason there wasn't more there was because of the fact, that just as Mark had told us—there was several of the boys that we had asked up there personally, and they told us afterwards they really were afraid to come. One Mexican boy said, "I am afraid to even be seen talking to you boys on the street or on the road."

Mr. Howlett: I move to strike it on the ground that it is hearsay testimony; the parties not named, and no chance of cross examination; no proper foundation laid.

Mr. Mauritsen: I think the Board can weigh the evidence.

(Testimony of William G. Ashworth.)

Trial Examiner Stephenson: I will allow the statement to stand; then if you want to probe into it, Mr. Howlett, to find out who made the statements to him, you may do so. [249]

WILLIAM G. ASHWORTH

a witness recalled for further cross examination, further testified as follows:

Recross Examination (Continued) [261]

Q. Mr. Ashworth, how long had you acted as crew leader before you received your increase in pay?

A. Possibly a year. I was in the sewer pipe drawing crew for several months and I had the same standing there that I had in the tile roofing crew.

Q. Were you a crew leader in the tile roofing crew?

A. At the time of my discharge and for several months pre- [262] vious. All the time I was in the tile roof crew at the last.

Q. When were you appointed or when did you act as crew leader first? Was it March 1st, on or about March 1st, or was it prior to that time? Just approximately?

A. I think it was before March 1st. I don't remember just exactly when I went back over to the tile roof crew from the sewer pipe drawing crew.

(Testimony of William G. Ashworth.)

Q. But it was three or four or several months before June 1st?

A. It was several months. [263]

Q. Did you receive more money than the other men in the crew? A. No, sir.

Q. At no time? A. No time until June 1st.

Q. And at that time you received a 5 cent raise instead of a 2½ cent raise?

A. Yes, sir. [264]

Q. (By Mr. Mauritsen) Mr. Ashworth, if the Board should order your reinstatement with back pay, would you accept reinstatement with respondent company? A. Yes. [270]

LAWRENCE H. GERMAN

called as a witness by and on behalf of the Labor Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: Lawrence H. German.

Trial Examiner Stephenson: Take the stand, Mr. German.

Direct Examination

Q. (By Mr. Mauritsen) Mr. German, have you ever worked for the respondent company?

A. Yes, sir.

(Testimony of Lawrence H. German.)

Q. When did you first start to work for Respondent? [274]

A. About January the 27th.

Q. What year? A. 1937.

Q. 1937? A. Yes, sir.

Q. What was the nature of your work while you were employed by Respondent?

A. Well, for the last 18 weeks I worked in the shop as a mechanic and general maintenance.

Q. What did you do prior to that time?

A. Well, I was just on general work around the tunnel kiln building.

Q. For the last 18 weeks, approximately, you worked as mechanic and general maintenance man?

A. Yes, sir.

Q. What was your wage rate when you first started to work for the company?

A. 45 cents an hour.

Q. Did you receive any increase in pay while you were working for the company?

A. Yes. I think it was about 80 days, I think it was, after I started, I got a 5 cent raise.

Q. At that time you received 50 cents an hour?

A. Yes.

Q. Did you receive any additional raise while you were [275] working?

A. A 2½ cent raise the last week.

Q. The general raise on June 1st?

A. Yes.

Q. Are you a member of the union?

A. Yes, sir.

(Testimony of Lawrence H. German.)

Q. When did you join the union?

A. June 1st.

Trial Examiner Stephenson: This year?

The Witness: Yes, 1937.

Q. (By Mr. Mauritsen) 1937? A. Yes.

Q. You signed an application for membership at the first meeting that the union held on June 1st, 1937? A. Yes, sir.

Q. Did you attend any further meetings of the union? A. Yes, sir.

Q. Did you attend the meeting on June 5th, 1937? A. Yes.

Q. Did you participate in the election of officers for the union? A. Just in a vote.

Q. Did you attend the meeting on June, 1937?

A. Yes, sir.

Q. When were you laid off by respondent company? [276]

A. I think it was June 9. I couldn't be positive.

Q. And who laid you off at that time?

A. Well, I just got a notice in my card.

Trial Examiner Stephenson: I didn't catch the answer.

The Witness: Just a notice on the time card, is all.

Q. (By Mr. Mauritsen) Did you see Mr. Bodine, and the other foremen whose names have been mentioned, at this first meeting on June 1, 1937?

A. Yes, sir.

Q. Were you on the picket line during the strike? A. Yes.

(Testimony of Lawrence H. German.)

Q. Did you see Mr. Bodine, and the other foremen whose names have been mentioned, going into the plant and from the plant during the time the strike was in progress? A. Yes, sir.

Q. Did you ever apply for reinstatement to the company? A. Yes.

Q. What was the first occasion upon which you applied for reinstatement?

A. Well, I think it was about two weeks after the strike was over. I couldn't say what day it was.

Q. Well, that would be approximately the 10th of July, 1937, would it not?

A. Well, no. It was—I think it was before the 4th of [277] July.

Q. Would you say it was about the 1st of July?

A. I would say it was the last part of June.

Q. And to whom did you apply at that time?

A. Mr. Bodine.

Q. And did he say—what did he say when you applied for work?

A. He said he didn't have anything for me to do.

Q. Did he say anything about the union at that time? A. No.

Q. Did you apply for work after that first application? A. Yes, sir.

Q. Do you recall on what occasion?

A. I think it was around the last part of October; somewhere along about the 20th.

Q. To whom did you apply at that time?

(Testimony of Lawrence H. German.)

A. Mr. Bodine.

Q. Were you successful in obtaining employment with Respondent at that time?

A. No, sir.

Q. Did Mr. Bodine give any reason for not employing you?

A. Lack of business is what he said. [278]

Q. Do you know if any of the men who replaced you in the shop were new men who had not been employed by Respondent as long as you were?

A. Yes.

Q. Who replaced you on the shop crew?

A. Well, I couldn't say exactly who replaced me.

Q. Who were the new men, who hadn't worked at the plant as long as you, who were on the crew?

A. John Hall and Mr. Baer.

Q. Is that the Mr. Baer who is—— [279]

Mr. Howlett: Just a minute. I don't understand the question.

Trial Examiner Stephenson: Will you read the question and answer?

(The desired question and answer were read by the reporter as set forth above.)

Mr. Howlett: All right.

Q. (By Mr. Mauritsen) This Mr. Baer, is that the same Mr. Baer who has been previously identified as assistant superintendent? A. No.

Q. It is some other Baer? A. Yes.

Mr. Mauritsen: That is all. You may cross examine.

(Testimony of Lawrence H. German.)

Cross Examination

Q. (By Mr. Howlett) Mr. German, do you know definitely that your position has been filled?

A. Yes, sir.

Q. You do know that? A. Yes.

Q. Who is the man holding it?

A. Well, I probably couldn't say who exactly has my position. He got on the shop crew after I left.

Q. What part of the shop crew were you on?

A. General maintenance. [280]

Q. How many men were there on that crew?

A. Five, I think.

Q. So you have no way of telling whether they took your job or somebody else's job, have you.

A. I was the only one laid off.

Q. You were the only one laid off in that department?

A. There were two of us laid off and two put on.

Q. When were they put on?

A. One was put on a couple of weeks before the strike, and the other one has been put on since.

Q. And what have you been doing since the time you left?

A. I worked as a carpenter for a couple of weeks, then I didn't have a job. Now I am working as a mechanic.

Q. Did you ever work at the Corona Auto Wrecking Company? A. Yes, sir.

(Testimony of Lawrence H. German.)

Q. When was that?

A. I worked there two weeks in July, and then I worked there, I think it was three weeks—three or four weeks this fall.

Q. Now, are there any other places that you worked?

A. No; I went back home.

Q. Where is that? A. North Dakota.

Q. North Dakota? A. Yes, sir. [281]

Redirect Examination

Q. (By Mr. Mauritsen) Mr. German, if the Board should order your reinstatement with back pay would you be willing to accept reinstatement with the company? A. Yes, sir.

Mr. Mauritsen: That is all.

Trial Examiner Stephenson: Any questions, Mr. Gately?

Cross Examination

Q. (By Mr. Gately) When did your employment terminate at the company?

A. I think it was June 9th.

Q. That you were laid off? A. Yes. [282]

CHESTER W. LUCAS

called as a witness by and on behalf of the Labor Board, having been first duly sworn, was examined and testified as follows:

(Testimony of Chester W. Lucas.)

Trial Examiner Stephenson: State your name.

The Witness: Chester W. Lucas.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Lucas, have you ever worked for respondent company?

A. Yes, sir.

Q. When did you first start to work for the company?

A. Well, it was right around the first of July, I think, in 1935.

Q. In 1935?

A. Yes. I wouldn't be positive as to the date, but right close to that.

Q. What position did you occupy while you were with the respondent company?

A. Mechanic on maintenance crew. [283]

Q. Did you work with Lawrence German, who just testified. A. Yes, sir.

Q. You were in the same crew?

A. Yes, sir.

Q. At what wage rate were you paid when you first started to work for the company?

A. 45 cents an hour.

Q. Did you receive any increase while you were working for the company?

A. Yes; about three, I think. Two or three, not including the 2½ cent raise on June 1st.

(Testimony of Chester W. Lucas.)

Q. At what rate were you being paid when you were last employed by them? A. 62½.

Q. Did that include the last general raise on June 1st? A. Yes, sir.

Q. While you were employed by Respondent did you have an opportunity to observe the working conditions in the plant at all?

A. Well, to a certain extent. I was around repairing the different places around the plant.

Q. Were you in the plant every day; that is, practically every working day?

A. Well, practically so. Some days we would be in the shop all day and other days we would be out around the plant. [284]

Q. In this general maintenance work, is that to maintain the machinery around the plant? Is that is what is meant by that term? A. Yes. [285]

Trial Examiner Stephenson: All right. You may answer that question. A. Yes, sir.

Q. (By Mr. Mauritsen) Did you hear him testify as to these faulty gin poles? A. Yes, sir.

Q. Was his testimony in that regard true, to your knowledge?

A. Well, I know they were in poor condition because we had to work on them when they were brought into the shop, but as to their actual working condition, I couldn't say.

Q. Was it necessary to bring these gin poles in frequently for repair?

(Testimony of Chester W. Lucas.)

A. Well, quite often, yes, sir.

Q. Are you a member of the union?

A. Yes, sir.

Q. Did you attend the meeting held on June 1st, 1937? A. Yes, sir.

Q. Did you apply for membership at that time?

A. Yes, sir.

Q. Were you sworn in as a member of the union at that time? A. Yes, sir.

Q. Did you attend the meeting on June 5, 1937?

A. Yes, sir.

Q. Did you participate in the election of the officers? A. Yes, sir. [286]

Q. Did you attend the meeting of June 9, 1937?

A. Yes, sir.

Q. Did you participate in the drafting of the petition to the company? A. Yes.

Q. Was that petition, containing your requests, considered by the union?

A. Well, it was. It was drafted and redrafted several times. Different ones suggested different things.

Q. That is, different ones of the members at the meeting?

A. Yes, sir. And as each one was brought up it was discussed, and it was changed several times before it was finally completed.

Q. Was there a vote upon the adoption of the petition? A. Yes, sir.

(Testimony of Chester W. Lucas.)

Q. What was the announced result of that vote?

A. The vote was unanimous for adoption of it.

Q. Was there a vote taken upon the union calling a strike in the event no favorable action was received? A. Yes, sir.

Q. And what was the announced result of that?

A. There was a unanimous ballot for it.

Q. Now, Mr. Lucas, were you a member of the committee which presented this petition to Mr. Bodine? A. Yes, sir. [287]

Q. At what time in the morning was the petition presented to Mr. Bodine?

A. Well, I couldn't tell the exact minute, but between a quarter after seven and seven-thirty.

Q. In the morning? A. Yes, sir.

Trial Examiner Stephenson: Of what date?

The Witness: The morning of the 10th.

Trial Examiner Stephenson: June 10th?

The Witness: Yes, sir.

Trial Examiner Stephenson: 1937?

The Witness: 1937, yes, sir.

Q. (By Mr. Mauritsen) What did Mr. Bodine say when you gave him the petition?

A. Well, he just simply sat down and read it over and after he had read the petition he said he would see Mr. Larson and talk it over with him; that he couldn't give us any answer or say-so on his own responsibility.

Q. Did you see Mr. Larson at the plant that day?

(Testimony of Chester W. Lucas.)

A. Yes, sir.

Q. Did you ever discuss the petition with Mr. Bodine after that time?

A. That same evening, about a quarter to four I should say.

Q. What did Mr. Bodine say to you?

Mr. Howlett: Just a minute. I am going to object to [298] that unless there is more foundation laid as to the time, place and parties present.

Trial Examiner Stephenson: Yes. Fix the time.

Q. (By Mr. Mauritsen) You testified, Mr. Lucas, that Mr. Bodine talked with you further about a quarter to four, is that right? A. Yes, sir.

Q. Who were present at that time?

A. Well, in the shop there was at least three of us there; Peterson, a foreman; Mr. Sternberg, and myself.

Q. Did these other two gentlemen take part in the discussion? A. No, sir.

Q. Did they overhear what Mr. Bodine said?

A. No. They couldn't, because he called me over to one side of the shop, and with the machinery running it would be impossible to hear, I think, over four or five feet.

Q. What did Mr. Bodine say to you at that time?

A. He simply said they wouldn't take any action on the petition, that it didn't have any backing and they couldn't do anything about it; that they wouldn't have anything to do with it; that we didn't

(Testimony of Chester W. Lucas.)

have anything to back us up in our complaint on it—in our demands, and they would ignore it.

Q. When this petition was presented to Mr. Bodine in the morning, who were the others of the committee who presented [299] this petition to Mr. Bodine?

A. Glen Stewart, Louis Juarez, and myself.

Q. Which one of you handed the petition to Mr. Bodine? A. I did.

Q. Now, you were present also at a meeting held June 9, 1937? A. Yes, sir.

Q. Were any instructions given to the burners of the various kilns at that meeting in the event you went out on strike? A. Yes, sir.

Q. What were these instructions?

A. Well, they were instructed not to leave until someone either relieved them or until they were in a condition that they could shut them off—shut off the fires.

Q. Did a strike occur at the Alberhill plant of Respondent on June 11, 1937? A. Yes, sir.

Q. How many men worked in the plant on that day while the strike was in progress?

A. Well, it would be hard to say, but I think about six.

Q. Did that include the two burners who had been requested to stay?

A. No, sir. They came out.

(Testimony of Chester W. Lucas.)

Q. Do you know who the men were who stayed in the plant?

A. Well, I know who—let's see. I know positive four. [300]

Q. Would you name those four?

A. There was John Hall, Jack Osborne, Tommy Osborne, Bud Smith; and I know another one, but I can't recall his name.

Q. Did the foremen, Mr. Bodine, Mr. Baer, Mr. Mills and Mr. Gantz go out on strike?

A. No, sir.

Q. Were you on the picket line during the progress of the strike? A. Yes, sir.

Q. Did you see these foremen whom I have named going to and from the plant during that time? A. Almost every day, I think.

Q. Did you ever speak with them?

A. Yes, sir; as they would go in and out, we would speak, "Good morning," or "Good evening," as they went home in the evening.

Q. I show you Board's Exhibit 3.

A. Yes, sir.

Q. Were you present at the meeting of the union at which the sending of that letter was discussed?

A. Yes, sir.

Q. Did you have an opportunity to express whether or not you desired to send that letter?

A. There was quite a bit of discussion on it; some of it added to it and some didn't. [301]

(Testimony of Chester W. Lucas.)

Q. Did you acquiesce in the sending of that letter? A. Yes, sir.

Q. I show you Board's Exhibit 4. Were you present at the meeting of the union at which the sending of that letter was discussed?

A. Yes, sir.

Q. Did you have an opportunity to express your opinion in regard to the sending of the letter?

A. Yes, sir. We all did. Anyone could express an opinion that cared to.

Q. Is your name on that letter, Mr. Lucas.

A. Yes, sir.

Q. Did you ever apply for reinstatement with Respondent after the strike had been called off?

A. Yes, sir.

Q. On what date did you first apply for reemployment? A. On June 25th, I believe.

Q. On June 25th, 1937? A. Yes, sir.

Q. To whom did you apply at that time?

A. Mr. Bodine.

Q. What did he say at that time?

A. That he didn't have anything for us.

Q. Did you ever apply after that time?

A. Yes, sir; twice after that. [302]

Q. Were you ever successful in obtaining employment with the company?

A. No. The second time I was over there, he said they were going to cut down the shop force, and the third time I was over there, he said they

(Testimony of Chester W. Lucas.)
were going to send the work back into Los Angeles to have it done.

Q. Mr. Lucas, in the event that the Board should order your reinstatement with back pay, would you be willing to accept employment with respondent company?

A. I don't know. It would all depend upon conditions.

Mr. Mauritsen: You may inquire.

Cross Examination

Q. (By Mr. Howlett) You left of your own accord, did you not? A. No, sir.

Q. Did you go on strike? A. Yes, sir.

Q. I mean, you were not discharged.

A. No, sir.

Q. You have been working as a truck driver for some time since then, have you not?

A. Since September the 20th.

Q. At the beach? A. Yes, sir. [303]

Q. (By Mr. Howlett) At the meeting of June 9, there were how many present at that meeting, in your estimation?

A. Well, it would be pretty hard to say. The room was full there. There was quite a bunch there. There must have been anyhow 75 or 80, or more than that.

Q. Then at the next meeting how many men were present?

(Testimony of Chester W. Lucas.)

A. At the next meeting there was practically all of them there.

Q. Practically all?

A. They wasn't all inside, because the building wasn't big enough to accommodate them all at once. Some of them were on the outside.

Q. You saw Mr. Larson at the plant on June 10, 1937, did you? A. Yes, sir.

Q. That was later in the day after you had been to see Mr. Bodine in the morning?

A. No. He was through the shop on and off, at different times. [305]

Q. But he wasn't there the first time you went to see Mr. Bodine? At least, you did not see him?

A. No.

Q. The men that were left there to take care of the kilns that were in operation, do you know how long they stayed there, of your own knowledge?

A. One of them came out about 20 minutes to 8, and the other one about, I should say, 9:00 o'clock.

Q. Morning or afternoon?

A. In the morning.

Q. That is of June 11th?

A. June 11th, yes, sir.

Q. Do you know who took their places at that time?

A. Jack Baer took charge of the tunnel kiln. Art Hannum was the burner on the tunnel kiln, and

(Testimony of Chester W. Lucas.)
Jack Baer took that; and Mr. Bodine, I think, looked after the other kiln. [306]

ARNOLD MOSS

called as a witness by and on behalf of the Labor Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: Arnold Moss.

Trial Examiner Stephenson: Take the stand. [307]

Direct Examination

Q. (By Mr. Mauritsen) Mr. Moss, have you ever been employed by respondent company?

A. Yes, sir.

Q. When were you first employed by the company? A. April 13.

Q. 1937? A. 1937.

Q. What were your duties when you first began to work for the Respondent?

A. When I first started I started first with a pick and shovel leveling up ground to place new machinery—or machinery. I don't know whether it was new or not.

Q. Did you do that work all the time while you were employed by the company? A. No.

Q. What did your duties consist of after that?

(Testimony of Arnold Moss.)

A. Well, I loaded trucks, worked handling brick some, unloading kilns, helped put floors in one kiln or two.

Q. Did you receive any increase in pay while you were working for Respondent?

A. Only one.

Q. Only one?

A. Yes; on June 1st. The general raise.

Q. The general raise on June 1st? [308]

A. Yes.

Q. When did your employment with the Respondent terminate? When did it end?

A. June 3rd.

Q. Were you laid off at that time?

A. I was laid off.

Q. Who laid you off? A. Jack Baer.

Q. Was he the assistant superintendent?

A. I suppose.

Q. What did he tell you at that time in regard to the lay-off?

A. Well, he told me they was cutting down the force, and I asked him if I was canned for good or what, and he said just for a month or a few weeks. He said, "We have nothing against you. You are a good worker and you will be called again." And I told him I wanted to know if I should stay around and wait for a job or get out and look elsewhere and he said, no; he couldn't keep all the men on the job and he would have to lay them off until business picked up.

(Testimony of Arnold Moss.)

Q. In other words, he told you it was a temporary lay-off?

A. Yes, sir, a temporary lay-off. I asked him and he said that.

Q. Mr. Moss, are you a member of the union?

A. Yes. [309]

Q. When did you join the union?

A. June 2nd, 1937.

Q. Where did you join the union?

A. At Ed. Hannum's house.

Q. Is that the Ed. Hannum who was later elected president of the union? A. Yes, sir.

Q. Did you attend the meeting on June 5, 1937?

A. No.

Q. Did you attend the meeting on June 9, 1937?

A. Yes.

Q. Did you take part in the discussion in that meeting? A. Yes.

Q. Did you consider the petition that was to be presented to the company?

A. Did I consider it?

Q. Did you consider it? Did you discuss it with the other members? A. Yes. We discussed it.

Q. Were you on the picket line during the progress of the strike? A. Yes.

Q. Did you see the Respondent's foremen going to and from work? A. Yes, sir. [310]

Q. Did you ever talk with them?

A. No, sir. I never talked with them.

(Testimony of Arnold Moss.)

Q. Mr. Moss, I show you Board's Exhibit 4. Is your name attached to the list which is attached to that letter? I believe it is arranged alphabetically.

A. Yes.

Q. Since the strike has been called off, did you ever apply for reinstatement? A. Yes.

Q. To whom did you apply?

A. Mr. Bodine.

Q. What did he say at that time?

A. Well, the first time he said, "There is no use of hanging around here." There was quite a few out there.

Q. On or about what date did you first apply?

A. It was on or about the 27th or 28th.

Q. The 27th or 28th of June? A. Yes.

Q. 1937? A. Yes.

Q. Have you applied since that time?

A. Yes, sir.

Q. How many times? A. Twice.

Q. Have you ever obtained employment from the company since [311] that time?

A. No, sir.

Q. Are you a married man, Mr. Moss?

A. Yes, sir.

Q. Do you have a family? A. Yes, sir.

Q. Have you had employment since the termination of the strike? A. I have had a little.

Q. Are you now employed? A. No, sir.

Q. In the event that the Board should order your reinstatement with back pay would you be

(Testimony of Arnold Moss.)

willing to accept employment from Respondent?

A. Yes, sir. [312]

Redirect Examination

Q. (By Mr. Mauritsen) During the time you were employed by Respondent were any other people put on? A. Yes, sir.

Q. Do you know approximately how many have been employed since you were employed there?

A. The short time I was there there were seven or eight, that I know of. Of course, all the men are kind of new to me; but seven or eight that I know of. They told me.

Q. In other words, they told you that they hadn't worked there before?

A. Yes, sir; they told me that. [313]

JAMES GRIER

called as a witness by and on behalf of the Labor Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: James Grier.

Trial Examiner Stephenson: Take the stand, Mr. Grier.

Direct Examination

Q. (By Mr. Mauritsen) Have you ever been employed by respondent company?

(Testimony of James Grier.)

A. Yes, sir.

Q. When did you first start to work for the company? A. January 10 or 11, 1934.

Q. When did your employment with the company end? [314] A. June 10, 1937.

Q. Did you work continuously during that time for the company?

A. Yes, with the exception of one vacation—a short time; I took a couple of months off, because work wasn't very steady and I was only getting a couple of hours a day.

Q. What was the nature of your duties when you first started to work for Respondent?

A. General labor in the yard.

(Discussion off record.)

Q. Did you act as general laborer in the yard during the entire course of your work for Respondent?

A. No. I worked at labor for approximately a year—a little over, then I went to truck driver and operating power equipment in the pits.

Q. What were your duties when you were last employed by Respondent?

A. Driving the water truck and keeping up the roads.

Q. Of what crew were you a member?

A. Pit crew.

Q. And as respects length of service, how did you stand in comparison with the other members of that crew?

(Testimony of James Grier.)

A. In point of service I was second driver or operator on power equipment, with the exception of the power shovel.

Q. In other words, was there one man who had worked longer [315] in that crew than you?

A. In truck driving, and the man on the hoist was an older man than I.

Q. At the most there were two that were older?

A. Yes; two men older than I on the operating end.

Q. Do you know who was the first truck driver?

A. Yes.

Q. Who? A. John Walker.

Q. That is in point of service, he was the only man— A. The only driver ahead of me.

Q. The only driver ahead of you? A. Yes.

Q. I believe you stated that your employment was terminated June 10, 1937? A. Yes.

Q. Are you a member of the union?

A. Yes, sir.

Q. When did you join the union?

A. June 5, I believe.

Q. Were you present at the union meeting held June 1st, 1937? A. No, sir.

Q. Were you present at the meeting held June 5? A. Yes, sir. [316]

Q. Did you apply for membership at that time?

A. Yes, sir.

Q. Did you sign an application card?

A. Yes, sir.

(Testimony of James Grier.)

Q. Were you sworn in? A. Yes, sir.

Q. Who laid you off on June 10, 1937?

A. Mr. Mills, the pit foreman.

Q. Mr. Mills? A. Yes.

Q. What did he say at that time?

A. He said that for lack of orders or lack of business they would have to cut the crew down and lay the water wagon off.

Q. Mr. Grier, what wage did you first receive when you started to work for the company?

A. 37 cents an hour.

Q. And what were you receiving when your employment was terminated by Respondent?

A. 50½ cents an hour.

Q. During the last period of your employment you were engaged as truck driver?

A. Yes sir, truck driver, or I run the pumps, and almost any mechanical work in the pits, with the exception of the power shovel.

Q. With the exception of the power shovel? [317]

A. Yes.

Q. In what condition were the trucks that you were required to drive?

A. All of them, with the exception of one of them, were in very poor shape most of the time.

Q. What do you mean by poor shape?

A. Well, they would be in the shop at least once a week, and from that to three or four times a week. Always once a week; and probably all day or two days.

(Testimony of James Grier.)

Q. Did they have good lights?

A. They didn't have any lights on them. I only drove them days.

Q. How were the brakes?

A. They didn't have any brakes on about half of them. [318]

Q. Now, Mr. Grier, were you on the picket line during the strike? A. Yes, sir.

Q. Did you see the foremen of the respondent company as they went to and from the plant?

A. Yes, sir. [320]

Q. Did you ever speak to them?

A. Not to talk to them. Just to wave to them or something like that. We never spoke; never held a conversation with them.

Q. I hand you Board's Exhibit 4. Will you please examine that and tell the Examiner whether your name is on the list attached to the letter.

A. Yes, sir.

Q. Did you ever make other application for reinstatement?

A. Yes, sir, three different times.

Q. What was the date of the first application, do you know? A. June 25th.

Q. Was that the day on which the strike was called off? A. Yes, sir.

Q. To whom did you apply for reinstatement?

A. Mr. Bodine.

Q. What did he say at that time?

(Testimony of James Grier.)

A. He said that the crew; that is, the personnel would be cut to 90 instead of the former list, and they had all those number of men and there wouldn't be any places for the rest of us.

Q. Do you know whether anyone was employed subsequently who drove your truck?

A. Yes, sir.

Q. Do you know whether he had been with the company prior [321] to that time?

A. One fellow that took it right after they started again had been with the company approximately six months, but had never driven. He was a laborer before.

Q. You say he took it first. Did anybody take it subsequent to that time?

A. To my knowledge another man took it for a while, then he was put on the dump truck afterwards.

Q. Do you know who that man was? Can you give his name?

A. It is Morrell, as far as I know; a young man, I would say about twenty years old.

Q. Do you know whether he had ever worked for the company before?

A. Not to my knowledge.

Q. And approximately how long did you work for the company prior to your lay-off?

A. About three years and five months.

Q. Mr. Grier, if the Board should order your reinstatement with the payment of back pay, would

(Testimony of James Grier.)

you be willing to accept employment with the Respondent? A. Yes, sir.

Mr. Mauritsen: You may cross examine.

Cross Examination

Q. (By Mr. Howlett) Did you go out at the time of the strike? [322]

A. No, sir. I was laid off.

Q. Laid off the same day?

A. Laid off the day before.

Q. On the 10th?

A. I was laid off the 9th, but the date on my severance slip, or social security slip is dated the 10th.

Q. So it was actually the 9th?

A. It was actually the 9th, dated the 10th. [323]

FRANK GERMAN

called as a witness by and on behalf of the Labor Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name. [329]

The Witness: Frank German.

Trial Examiner Stephenson: Take the stand.

Direct Examination

Q. (By Mr. Mauritsen) Have you ever been employed by the respondent company?

(Testimony of Frank German.)

A. Yes, sir.

Q. When did you first enter their employ?

A. August 21, 1936.

Q. And what was the nature of your duties when you first started to work for the company?

A. To begin with, it was general labor, drawing kilns—

Trial Examiner Stephenson: Can you speak a little louder?

A. Drawing kilns was the first job I had there.

Trial Examiner Stephenson: That is much better.

A. And general labor of all kinds.

Q. What work were you doing when you were last employed by the Respondent?

A. Driving a truck.

Q. What wage did you first receive when you were first engaged? A. 40 cents an hour.

Q. What were you receiving when you last worked for Respondent?

A. 50½ cents an hour. [330]

Q. Was that including the last general raise on June 1st?

A. That was including the last general raise.

Q. Had you ever had any complaints concerning your work? A. Well—

Q. I mean, unusual complaints? A. No. [331]

Q. When did you join the union, Mr. German?

A. The first meeting. I am not sure what the date was. I think it was June 1st.

(Testimony of Frank German.)

Q. June 1st, 1937? A. Yes, sir.

Q. You signed an application card at that meeting? A. Yes, sir.

Q. Did you attend the meeting on June 5, 1937?

A. Yes, sir.

Q. Did you attend the meeting on June 9, 1937?

A. Yes, sir.

Q. Did you vote on the question of sending the petition or request to the company? A. I did.

Q. Were you in favor of sending this petition to the company? [332] A. Yes, sir.

Q. Did you go out on strike on June 11?

A. Yes, sir.

Q. Did you take part on the picket line?

A. Yes, sir.

Q. Did you see Respondent's foremen going to and from the plant? A. Yes, sir.

Q. Did you ever speak with them?

A. Well, just the day that they came out to pay them fellows that hadn't got their checks, before.

Q. In other words, on that day they saw you on the picket line? A. Yes, sir.

Q. Which one of them saw you?

A. Mr. Bodine.

Q. Did he give you a check?

A. No. The timekeeper, Bob Neblett, gave the check to me.

Q. I hand you Board's Exhibit 4 and ask that you examine it and tell the Examiner whether your name is on that list? A. Yes, sir.

(Testimony of Frank German.)

Q. Did you ever make other application for reinstatement? A. Just once.

Q. On or about what day?

A. June 25th. [333]

Q. That was the day on which the strike was called off? A. Yes, sir.

Q. To whom did you apply?

A. Mr. Bodine.

Q. What was his reply?

A. He said that they weren't taking on any men at that time.

Q. Do you know whether your truck has been operated by anyone else since that time?

A. Yes, sir.

Q. Do you know who has operated your truck since that time?

A. Well, a colored boy by the name of Ernest is his first name. I don't know his last name.

Q. Had this colored boy named Ernest been employed before you went with Respondent or after you went with Respondent?

A. Before I went.

Trial Examiner Stephenson: I don't think the witness understands the question.

Reframe the question.

Q. (By Mr. Mauritsen) Had the colored boy, named Ernest, worked for Respondent as long as you had worked for them, or had he worked a lesser time? A. He had worked a lesser time.

(Testimony of Frank German.)

Q. He was junior to you, in other words, in seniority? A. Yes, sir.

Mr. Mauritsen: You may inquire. [334]

(Discussion off the record.)

Trial Examiner Stephenson: Proceed.

Cross Examination

Q. (By Mr. Howlett) You did go out on strike on June 10?

A. On June 11, when the strike was called.

Q. You have been working since the time you left? A. Part time.

Q. Where?

A. For Steve Ragsdal at Desert Center; and I worked for International Manufacturing Company at Elsinor.

Q. Is that all? A. Yes, sir.

Q. You were back in Dakota part of the time, were you? A. Yes, sir.

Q. On your father's farm? A. Yes, sir.

Q. You worked there, did you? A. Yes.

Mr. Howlett: That is all.

Trial Examiner Stephenson: Anything further, Mr. Mauritsen?

Mr. Mauritsen: I have another question.

Redirect Examination

Q. (By Mr. Mauritsen) Mr. German, in the event that the Board should order your reinstatement with back pay, would [335] you accept employment with Respondent? A. Yes, sir.

LAWRENCE McNUTT

having heretofore been sworn and testified as a witness on behalf of the Board, was recalled for further examination.

Trial Examiner Stephenson: You have already been sworn, Mr. McNutt?

The Witness: Yes, sir.

Direct Examination

Q. (By Mr. Mauritsen) Now, Mr. McNutt, of what did your duties consist while you were engaged by Respondent?

A. Kiln drawing; tile kiln drawing and brick kiln drawing. [336]

Q. Was that in the sewer pipe kiln?

A. Brick and tile.

Q. Brick and tile?

A. Roof tile. Flue lining, too.

Q. Did it consist of drawing all those things; that is, sewer pipe kiln—

A. I only worked in about two sewer pipe kilns. The other kilns were roof tile and brick and flue lining.

Q. Did you work any amount of overtime while you were working for Respondent?

A. On any number of occasions we worked overtime.

Q. Did you work any overtime during the last one or two months prior to your lay-off?

A. Yes, sir. The last Saturday I worked three hours overtime—the last Saturday in May. And on

(Testimony of Lawrence McNutt.)

a good many occasions prior to that I worked from one to two hours overtime loading trucks. [337]

Cross Examination

Mr. Howlett: Just one question, and that is not cross examination as to this examination.

Q. (By Mr. Howlett) Are all the parties whose names appear on these cards members of the union at this time?

A. I can't swear to that. They have never come to me and told me they weren't.

Q. And you are the secretary? A. Yes, sir.

Q. You have never had any of them tell you they were not?

A. I have never had any of them tell me they were not.

Q. You consider them all members?

A. I considered them all members at the time that they signed that, with due respect to their possibly wanting to drop out at this time. [340]

Q. Up to the time of the strike did you consider them all members? A. Certainly.

Q. And how long after the strike did you consider them all members?

A. I still consider them all members. [341]

Q. (By Mr. Gately) You heard Mr. Larson make the statement that he would never have a union in this plant; he would shut down first?

A. He made that statement; absolutely.

Q. What is the condition that brought that about; that is, what brought that statement on?

(Testimony of Lawrence McNutt.)

A. I think that followed when I said that perhaps a union label would help improve sales for him.

Q. Then he made the statement?

A. I think that was right subsequent to that statement of mine.

Mr. Gately: That is all. [344]

Recross Examination

Q. (By Mr. Howlett) Was that in the presence of Dr. Nylander? A. Yes, sir. [345]

Q. (By Mr. Mauritsen) Mr. McNutt, I show you Board's Exhibit 4, about which you testified previously. Did the union approve the sending of that letter at any meeting?

A. A meeting was held on the picket line June 25th, in the afternoon, just before the signs were pulled down, and then I presented this for a motion to those right there, and there it was accepted.

Q. Do you recall who suggested the sending of that letter?

A. I may say that our representative in Los Angeles, Mr. Sugar, suggested it might be a good idea to do that.

Q. Was that act approved by the union officers?

A. Yes, sir.

Q. Was it approved by other members of the union? A. Yes, sir. [347]

Recross Examination

Q. (By Mr. Howlett) Was it approved by all the people on that list? A. No, sir.

No. 9218

United States Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Transcript of Record

In Two Volumes

VOLUME II

Pages 285 to 571

Upon Petition for Enforcement of an Order of the National Labor Relations Board.

FILED

PARKER PRINTING COMPANY. 545 SANSOME STREET. SAN FRANCISCO 88-9-12-39

No. 9218

United States Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Transcript of Record

In Two Volumes

VOLUME II

Pages 285 to 571

Upon Petition for Enforcement of an Order of the National Labor Relations Board.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 85-9-12-39

GUSTAF LARSON

called as a witness by and on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: Gustaf Larson.

Trial Examiner Stephenson: Proceed.

Direct Examination

Q. (By Mr. Mauritsen) Are you employed by the respondent company? A. I am.

Q. In what capacity?

A. General superintendent.

Q. General superintendent? A. Yes.

Q. Does that comprise anything other than the Alberhill [348] plant?

A. Yes, it does. We have got lots of Los Angeles property.

Q. How often do you visit the Alberhill plant, ordinarily? A. Two or three times a week.

Q. Two or three times a week? A. Yes.

Q. Suppose that something comes up during the period when you are absent from the plant. How is that handled then, if it is of importance?

A. If it is important, I am called up.

Q. And who usually calls you on that?

A. Mr. Bodine.

Q. Mr. Bodine, the company superintendent at the plant? A. Yes, sir.

Q. When did he first call you after the union meeting held June 1st?

(Testimony of Gustaf Larson.)

A. I couldn't tell you. After June 1st? He never called me because I was up there several times.

Q. When did you first learn that a union was being formed at the Alberhill plant?

A. Well, I heard, but I don't know from who. But I heard that they had a meeting. In fact, they even distributed a notice in Los Angeles in our office.

Q. And that was on or about June 1st?

A. About. [349]

Q. So that you knew immediately that a meeting was to be held? A. I did.

Q. Now, Mr. Larson, did you receive notice of the petition which was presented to the company on June 9? A. I did.

Trial Examiner Stephenson: Referring to Board's Exhibit 2, is it?

Mr. Mauritsen: That is right.

The Witness: I got this notice June 10th, about 10:00 o'clock in the morning. I came up to the plant.

Q. You came up to the plant. Who gave you notice that this petition had been presented to the plant?

A. Mr. Bodine handed me the notice.

Q. What did he say?

A. He didn't say anything.

Q. Did you read the notice? A. I did.

Q. And what did you do thereafter?

A. I didn't do anything about the notice.

(Testimony of Gustaf Larson.)

Q. Did you make an attempt to get in touch with the men who signed that notice? A. No, sir.

Q. Why didn't you?

A. Why, it was impossible for me to do anything. The [350] notice was about 20 hours, and I had to call a directors' meeting, and the strike was on before the meeting could be held. My hands was tide. I had no authority to agree to any demands.

Q. Were you present at the plant?

A. Yes, sir. There was about a hundred men on the picket line when I drove in.

Q. When you drove in?

A. No. That was the second day. I take that back. It was the second day.

Q. The first day you had notice of this by 10:00 o'clock? A. Yes.

Q. And you didn't take any action on it?

A. No.

Q. Although the notice said there was to be a strike?

A. I took this notice and went to Los Angeles, and the following day I called up Dr. Nylander; that is, I had our office call up Dr. Nylander Monday, and made an appointment for me for Tuesday, I believe it was; maybe Wednesday; and I went up to see Dr. Nylander with that notice.

Q. But you made no attempt to meet with the men? A. No.

Q. Have you ever negotiated with the men at your plant at any time within the last ten years,

(Testimony of Gustaf Larson.)

say? A. They never asked for it. [351]

Q. How long have you been engaged in the brick business? A. 45 years.

Q. How long have you been engaged in the brick business at Alberhill?

A. Do you mean this company alone, or the companies altogether?

Q. With this company.

A. Since I went in this company in 1919.

Q. Were you engaged in business prior to that time at Alberhill? A. Yes, sir.

Q. In the brick business? A. Yes, sir.

Q. But you have been with this company since 1919? A. Yes, sir.

Q. During that period of time have you ever negotiated with a body of your employees, in any way?

A. Never had occasion to; never anybody asked me except men individually asked for it.

Q. They never attempted to bargain collectively? A. Never did.

Q. Mr. Larson, I show you Board's Exhibit 3. Will you please examine it.

A. I read that before.

Q. Did you ever see the original letter? [352]

A. I don't know. I believe they got the notice of it.

Q. You believe? Didn't you say to me that you had read that before?

(Testimony of Gustaf Larson.)

A. Yes. I believe I read that. Not this letter, but a letter like it.

Q. A letter just like it? A. Yes.

Q. Did you take any action at that time?

A. No, sir.

Q. You made no attempt to bargain with your men at that time? A. No, sir.

Q. Did you attend a conference called by Dr. Nylander on June 15th?

A. On June 15 I was down with Dr. Nylander myself.

Q. Alone?

A. Alone. I called Dr. Nylander—this strike was on the 11th, Friday. I was down at Alberhill Saturday and at Alberhill Monday, but I notified our office to make an appointment with Dr. Nylander on Monday. That was the 14th. Then the 15th I had a meeting with Dr. Nylander and Mr. Howard, in his office, and I brought this letter and I handed it to Dr. Nylander. I said, "We have a strike at Alberhill." He read that letter and threw it over to Mr. Howard and he said, "This strike is illegal. They can't do it." And I said, "They are doing it." [353]

Mr. Mauritsen: Mr. Examiner, I think that is not responsive.

Mr. Mauritsen: I move to strike it.

Trial Examiner Stephenson: Everything after the word "Alone" in the answer to the last ques-

(Testimony of Gustaf Larson.)

tion propounded by counsel for the Board will be stricken.

(Discussion off the record.)

Q. Mr. Mauritsen: Can we stipulate as to the date of the conference?

(Discussion off the record.)

Mr. Mauritsen: Mr. Larson, on what date did you have a conference in Dr. Nylander's office with the representatives [354] of the union?

A. I am not positive of that date, but it was in the week of the 25th. I am not positive of that.

Q. Now, Mr. Larsen——

A. It was—the reason I know it is because it was just a couple of days before this strike was called off, and I believe the strike was called off the 25th.

Q. Now, at this meeting with Dr. Nylander and the representatives of the union, did you offer to bargain with the representatives of the union at that time? A. No, sir.

Q. Did you or did you not say that before you would recognize the union you would close down your plant?

A. I did not. I never have said so.

Q. Yet you made no offer to bargain with the representatives of your employees?

A. You want to know the reason why I didn't?

Q. I want to know whether you did or not?

A. No, I didn't.

(Testimony of Gustaf Larson.)

Q. You refused to bargain collectively with them on June 10th, when the petition was presented to you, did you not? Did you or didn't you?

A. I never seen them. I got that letter (Indicating) but I never saw the men.

Q. On June 10—I am referring to Board's Exhibit 2—you [355] made no attempt to bargain with them at that time? A. No.

Q. I will show you Board's Exhibit 3. Did you make any attempt to bargain with them at the time you received that letter? A. No.

Q. And at the conference in Dr. Nylander's office you made no offer or attempt to bargain with them? A. I was never asked.

Trial Examiner Stephenson: The conference you are referring to now is the conference where the union men attended?

Mr. Mauritsen: Yes.

That is all.

Trial Examiner Stephenson: Let me ask a couple of questions. May I see the first letter, please?

Examination by the Trial Examiner

Q. (By the Trial Examiner) Mr. Larson, are you acquainted with Edward E. Hannum? Did you know him when you saw him?

A. I wouldn't know him. Is that this Hannum here? Q. Yes.

A. Well, I know him now, but I wouldn't have then.

(Testimony of Gustaf Larson.)

Q. Did you know you had a man in your employ by the name of Edward E. Hannum?

A. I am not sure of that either.

Q. Did you know whether you had a man in your employ by the [356] name of Lawrence McNutt? A. Yes, sir.

Q. You did know you had a man by the name of Lawrence McNutt?

A. I knew that when they struck.

Q. And did you know that the day you received Board's Exhibit 2? Did you know Lawrence McNutt was working for you then?

A. No, I didn't. When they struck I know McNutt was working for me, but when I got this letter I didn't know whether McNutt was working for us or anybody else. But after we got that notice then I knew McNutt was working for us.

Cross Examination

Q. (By Mr. Gately) Did you advise your foremen to attend that first meeting held by the union?

A. I did not.

Q. Chester Lucas testified that you spoke to him, I believe, in the shop after the date this Exhibit 2 was received. Do you remember that conversation?

A. I never did.

Q. Are you in favor of unions?

Mr. Howlett: Just a minute. I think that is objection- [357] able. I object to it on the ground that it isn't within the issues of the case. It calls for a conclusion of the witness and is immaterial.

(Testimony of Gustaf Larson.)

Trial Examiner Stephenson: As I understand it, you are general superintendent of the company?

The Witness: Yes, sir.

Trial Examiner Stephenson: Do you hold any other position besides that of general superintendent?

The Witness: I am the largest stockholder in the company and I am a director in the company.

Trial Examiner Stephenson: Objection overruled. Answer the question.

The Witness: What was the question?

Trial Examiner Stephenson: Read the question.

(The desired question was read by the reporter as set forth above.)

A. I am not against them if they are properly run.

Q. (By Mr. Gately) Do you think that Alberhill Clay Products Workers' Union was properly run?

A. Certainly not.

Q. Did you make any effort to find out whether they were properly run or not?

A. I did. I went to Dr. Nylander for that purpose.

Q. Don't you think you could have got more information from the union than from Dr. Nylander on that? [358]

A. I don't think I could.

Q. Did you ever make any attempt to consult with the officers of the union to find out what type of union it was? A. I never did.

(Testimony of Gustaf Larson.)

Q. What would you say was a properly run union?

A. A proper union would give you more than 24 hour's notice before they closed up the plant.

No one man—at least I couldn't answer their demand.

Q. Did you notify those men that that condition existed; that you couldn't answer it?

A. I couldn't at that time answer it.

Q. Couldn't you have told them that you were only one man and you would have to call a meeting of the board of directors, and to give you more time? Do you think the union would have done that?

A. I was in the plant that morning I got that notice. There was a lot of business and I couldn't get back until after 5:00 o'clock—6:00 or 7:00 o'clock, and took it up with our president of the company the next morning; and I went to the plant the next morning and he said, "Nothing can be done," and left it to me, and I went up there and when I got there they would hardly let me through the picket line. [359]

Q. (By Mr. Gately) Did you discuss the possibilities of the union with your foremen before this first meeting? A. I never did.

Q. Did any of your foremen ever tell you that there was a union coming in there?

A. Not that I know of.

(Testimony of Gustaf Larson.)

Q. Did Mr. Bodine or any of those present at that first meeting give you any report on what happened at the meeting or what was said?

A. No report. He may have told me that they were trying to form a union, but I didn't pay any attention.

Redirect Examination

Q. (By Mr. Mauritsen) Mr. Larson, you testified that you have no objection to a union if it is properly run. Did you make any attempt at all to learn whether this union was properly run?

A. I did. I went to Dr. Nylander. [360]

Q. I mean on the day on which you received the notice did you make any attempt to find out whether it was properly run or not?

A. As soon as I got that first notice of a strike, as soon as I had time, I took it up with Dr. Nylander, and I couldn't get an appointment before Tuesday.

Q. But you made no attempt to find out whether the union in your plant was properly run? You said you have no objection to a properly run union?

A. Well, anybody can see that the demands they asked that it was not properly run. It speaks for itself.

Cross Examination

Q. (By Mr. Howlett) When you went in to see Dr. Nylander, who was present at that time?

(Testimony of Gustaf Larson.)

A. The first meeting, Dr. Nylander and myself and Mr. Howard; that is Dr. Nylander's assistant.

Q. And when was that meeting held?

A. On Tuesday the 15th.

Q. And when you went in what did you say to Dr. Nylander?

A. First we had two appointments. My office made the ap- [361] pointment for 9:00 o'clock in the morning, and Dr. Nylander called in the morning and postponed it until 3:00 or 3:30 in the afternoon. And I went in and told him who I was and handed him that notice. He read it—can I change it a little bit?

Q. Surely.

A. When I got in Dr. Nylander wasn't in his office and the girl there took me into Mr. Howard and I said, "Dr. Nylander had an appointment with me," and we waited for a little while, then went out in the hall to look for Dr. Nylander, and he came, and Mr. Howard, myself and Dr. Nylander went into Dr. Nylander's office. That is how Mr. Howard was in with us. He read the letter over and threw it over across the table to Mr. Howard and he says, "That is illegal. They can't do it." And I said, "Well, they are doing it." And he was quite stirred up. He said, "I am going to San Diego during the week-end and I am going to make it a point to stop off at Alberhill and see if something can't be done and talk to the men." He said, "Any damage done?" And I said, "Certainly. They walked away

(Testimony of Gustaf Larson.)

from the kilns with fires burning and gave us no notice. We had to close down and there will be a big loss."

Then Dr. Nylander excused himself. He said, "I have a meeting. Will you go in and take this up with Mr. Howard?" Howard had left the office a few minutes before and I went [362] into Mr. Howard's office and he said, "I just called up the headquarters for the union. They said that the Alberhill had no authority to strike. It is illegal." He said, "The hot-heads don't know what to do."

Mr. Mauritsen: I fail to see the materiality.

Mr. Howlett: I think it is material.

Trial Examiner Stephenson: Go ahead.

A. He said, "I will have the union here in Los Angeles call that strike off; then you put all the men back to work again and we will supervise an election." And I said, "No, I won't. We will have the men we need back again—about a hundred men. That's all we can use. Then have an election and it is all right."

He said, "Will you take the men back?" And I said, "I will take all the men back with the exception of the men that walked out and left the kilns burning." I said, "What assurance have I got that they wouldn't do the same thing next week?"

And there was another man that I just—the Sunday before I took my family up there for the ride and showed them the new tunnel kiln, and the burner was sleeping on top of the kiln, sound

(Testimony of Gustaf Larson.)
asleep. The electric bell was ringing calling for him to take the car out and put it in. I couldn't find anybody around, and finally a man came running and I said, "A man is dead, lying on top of the kiln." I went and [363] hollered to him and couldn't wake him up so I threw some fire clay dust on the top of his face, then he woke up and came down. And I says, "I wouldn't have such a man back again." [364]

Examination by the Trial Examiner

Q. (By the Trial Examiner) How many conferences, Mr. Larson, did you have with Dr. Nylander?

A. I had—this was the first one. The second one was with Mr. Prussing and myself—

Q. And Dr. Nylander?

A. And Dr. Nylander.

Q. And the third one?

A. The third one was Mr. Stuart and myself with Mr. Howard; and the fourth one was Dr. Nylander and these boys—the union boys.

Q. Then you have had three conferences with Dr. Nylander and one with Mr. Howard?

A. Yes.

Q. Do you remember when the conference was held when the representatives of the union were present? Do you remember that date?

A. That was the last one, I know that.

(Testimony of Gustaf Larson.)

Q. That was the last one but do you remember the date?

A. It was in the week of the 25th; two days, I believe, before the strike was—before the strikers went back. [365]

Mr. Mauritzen: Mr. Examiner, at this time I should like to introduce Board's Exhibit 1-J. I believe a place was reserved in Board's Exhibit No. 1 for this request for a continuance, and opportunity to file an answer to the complaint.

Trial Examiner Stephenson: All right. The request for the extension of time to file an answer will be received and marked as Board's Exhibit 1-J.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 1-J.)

Trial Examiner Stephenson: Let the record show that the request is dated December 15, but that the same will be filed nunc pro tunc as preceding the order extending the time.

Mr. Mauritzen: At this time I should like to call Art Hannum.

ART HANNUM

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

(Testimony of Art Hannum.)

Direct Examination

Q. (By Mr. Mauritzen) Mr. Hannum, have you been employed by the Los Angeles Brick and Clay Products Company? [368]

A. Yes.

Q. When did you first start to work for respondent?

A. It was in the early part of February, around the first part. I forget just the date. It was somewhere around the 5th.

Q. 1937? A. 1937.

Q. And of what did your duties consist when you were first employed?

A. When first employed there I went on the bull gang, what is known as a bull gang in most places, just a common laborer.

Q. What hourly wage did you receive at that time?

A. The first sixty days was 40 cents an hour.

Q. And at the end of 60 days what rate did you receive?

A. I was put up with the rest of the laborers at 45.

Q. Did you receive any subsequent raises?

A. Yes. Just prior—well, the latter part of May, when they gave everybody a two and a half cent raise, I was included.

Q. So that at the time when your employment terminated you were receiving 47-1/2 cents an hour? A. Yes.

(Testimony of Art Hannum.)

Q. And what did your duties consist of at the latter part of your employment with respondent?

A. I was one of three burners on the tunnel job. [369]

Q. The tunnel crew? A. Yes.

Q. Are you a member of the union?

A. Well, I signed after the strike.

Q. You signed an application card and was sworn in? A. Yes.

Trial Examiner Stephenson: Pardon me. What was the answer to the preceding question?

(The record referred to was read by the reporter as set forth above.)

Q. (By Mr. Mauritzen) When did your employment with the respondent end?

A. On June 11, 1937.

Q. Did you go out on strike? A. I did.

Q. Did you go out on strike at the same time as the other employees of respondent went out on strike?

A. It was the same day, yes, but I stayed in until I was relieved.

Q. Why did you stay in?

A. It was talked over, we didn't want to in any way ruin any of the products out there. I was told by the president of the union the best thing to do was to stay in until I was properly relieved and everything was in good hands to take charge. [370]

Q. Was that Ed Hannum who told you to stay in?

(Testimony of Art Hannum.)

A. Yes, the president of the union.

Q. Who relieved you on the kilns?

A. Jack Baer, assistant superintendent.

Q. What day?

A. Well, the morning he came out there it was about 7:30. I was around by the instrument board there and he came around and he said, "Well, I am glad to see that they didn't get you."

I told him that I was sorry, I wasn't staying in after the other boys were out on strike; that I would go out too. And we went over the records, the tunnel kilns, in the various places, and the schedule. Everything was all right, on schedule and he took it over and I went on out to the room.

Q. What did Mr. Baer say to you at that time?

A. Well, I can't give you the exact words, while we were talking. Why, we got talking about the union, and I was in there for several minutes after he was out, over at the instrument board talking, and we got to talking about the unions and he told me he thought if we would have had either a company union in there or the A. F. of L. that Mr. Larson would have come around and talked business with us but he didn't like the C. I. O. policies and therefore he didn't know what would terminate the whole thing.

Q. Have you applied for reinstatement with the company? [371]

A. Yes.

Q. Do you recall when you first applied for reinstatement?

(Testimony of Art Hannum.)

A. It was the day the picket line was abandoned. I couldn't tell you the date. I know there was Mr. Lucas and myself and I believe Frank German went in at the same time and asked Mr. Bodine about it and he told me that he was sorry but they weren't going to start the tunnel kilns and he didn't know when they would start it, if ever. Mr. Lucas went and got his tools and I thanked Mr. Bodine and Jack for having given me the opportunity to learn the burners as much as I had on the tunnel gang.

Q. Did you ever apply for reinstatement after that time? A. No.

Q. Now, Mr. Hannum, I show you Board's Exhibit No. 4, and will you please examine the exhibit and tell the Examiner whether your name is attached to the list that is attached to that letter?

A. (Examining exhibit) Yes.

Q. Did you approve of the sending of that letter? I mean did you have any objection?

A. No, I have no objection to it.

Q. If the Labor Board should order your reinstatement with back pay would you be willing to accept employment with respondent?

A. (Pause) I don't know. I have a much better job now. [372] That would take some consideration. [373]

Cross Examination

Q. And you left, you struck on June 11, 1937, and when did you go to Keeler?

(Testimony of Art Hannum.)

A. I went to work at Keeler on July 14, 1937.

Q. For whom?

A. The Natural Soda Products Company at Keeler.

Q. Have you been working there since that date?

A. Yes, sir.

Q. You were working for more money than you worked at the Los Angeles Clay Products Company? A. Yes, sir.

Q. Have been at all times you were there?

A. Yes, sir.

Q. You say that you did not—off the record.

(Discussion outside the record.)

Q. (By Mr. Howlett) When did you leave your employment with the Los Angeles Brick Company, the date and approximate hour?

A. Well, the approximate hour was about 7:30.

Q. A. M.? A. A. M., yes.

Q. On June 11, 1937?

A. June 11, 1937.

Q. What work were you doing at the time you left?

A. Burning over on the tunnel kiln. I was one of three burners. [375]

Q. There were three burners at that time?

A. Yes.

Q. Who were the other two?

A. Leland Fuller and Gale Eaglin.

Q. When would your shift have been over had you not gone out on strike?

(Testimony of Art Hannum.)

A. I was on, at that time, from 2:00 in the morning until 10:00.

Q. So you left before the end of your shift?

A. Yes.

Q. And who was sent to relieve you on your work?

A. Jack Baer relieved me, the assistant superintendent, I believe.

Q. That is not his ordinary work, however?

A. No.

Q. He did that as a matter of emergency?

A. Yes.

Q. Do you recall along the month or so prior to your leaving there that you were sleeping on top of this kiln?

A. Yes. I was catching up on a little sleep. I had been there about 10 minutes, according to the clock.

Q. Now, you had a conversation with Mr. Baer, did you not. Where did that conversation take place?

A. By the instrument board.

Q. Did you start the conversation or did he, if you recall? [376] A. I don't recall.

Q. How long had you known Mr. Baer?

A. From the time of my employment. I had gone to work there, working directly under Mr. Baer.

Q. Did he work along with you at times?

(Testimony of Art Hannum.)

A. As much as the boss and employee would. He was my boss and I was the employee. He was my boss.

Q. At the time you were sleeping up there, that was during the regular time and you were being paid for that, I assume? Is that correct?

A. Yes.

Q. And what took place at this conversation? What was said by and Mr. Baer regarding this, anything in connection with the union?

A. Well, as I said, he told me that he thought that if we had either a company union there or were going with the A. F. of L. that he thought Mr. Larson would have talked with us and settled it, but he didn't think Mr. Larson liked the policies of the C. I. O.

Q. What were those policies that he referred to, do you know? A. No, sir.

Q. He did not state that?

A. No. As I recall he didn't.

Q. And now, the letter referred to in Exhibit B-4, you are [377] familiar with what I am now talking about, the letter shown you by Mr. Mauritzen? A. Yes.

Q. You did not previously approve the sending of that letter? A. Approve it?

Q. Did not previously authorize the sending of that letter?

(Testimony of Art Hannum.)

A. I authorized the union to act as my agent.

Q. But you never told them to send the letter and did not see the letter until after it was sent, is that correct? As a matter you have never seen the letter before?

A. The real truth, this is the first day I have seen the letter, yes.

Mr. Howlett: I think that is all.

Cross Examination

Q. (By Mr. Gately) Do you remember Mr. Larson throwing some dirt in your face?

Trial Examiner Stephenson: That is the time you were sleeping.

The Witness: Well, on the record, I asked Mr. Larson also if he went home with all his teeth.

Q. (By Mr. Gately) Now, that is not the question.

A. No, sir, Mr. Larson never at any time threw any dirt in my face. Mr. Larson was standing down at the foot of the kiln and he called to me and I woke up and I got down off the kiln and walked around, passed my instrument board and [378] checked my instruments and went around by the clock. I had made my round at 5:00 and it was 5:15 after I had read my instrument board and went around pass the clock again. I happen to remember because I told Jack Baer about it the next morning.

(Testimony of Art Hannum.)

Q. When Mr. Larson woke you up at that time, was the bell ringing?

A. As these records on the tunnel kiln would show, no. We were on a three hour schedule, and a car went in at 3:00 and the next was at 6:00 o'clock. I had checked it at 5:00 o'clock, and the records will show that the 3:00 o'clock car went in on schedule.

Mr. Gately: That is all.

Redirect Examination

Q. (By Mr. Mauritzen) Now, at the time you were relieved by Mr. Baer, at the time when you left going out on strike, did I understand you to say that you checked things over first with Mr. Baer before you left? A. Yes.

Q. That is you checked——

A. (Interrupting) We went over the records. We went over the heat. We had instruments there to tell the heat in the various parts of the kiln, our drafts, and the schedules we were on, and the schedules and the heat were proper.

Q. Did Mr. Baer make any statement that anything was out [379] of order? A. No, sir.

Q. Did he say that things were satisfactory at that time?

A. Yes, sir, everything was all right so far as the tunnel kiln was concerned.

(Testimony of Art Hannum.)

Q. And you made an effort to check your records to see that they were all right?

A. Yes. We went over the records, just the same as we did at the end of each shift when we turn over to the next man. We went over our records for the shift with the next man.

Q. And these records would have shown if anything was out of order? A. Absolutely.

Q. Is Mr. Baer your immediate superior?

A. Yes. I believe he was in charge of the tunnel kiln there. I took my orders from Mr. Baer.

Q. Had he been your superior during the entire time of your employment on the tunnel kiln?

A. Yes, sir.

Mr. Mauritzen: That is all. [380]

Recross Examination

Q. (By Mr. Gately) When did this incident happen about you being asleep, when Mr. Larson found you asleep? When did that occur?

A. It was one Sunday about—it was 5:00 o'clock one Sunday, about a month before.

Q. A month before the strike? A. Yes.

Q. So he didn't fire you on account of finding you asleep? A. No.

Q. You stayed on until the strike?

A. Yes.

Trial Examiner Stephenson: Anything further, gentlemen?

(Testimony of Art Hannum.)

Redirect Examination

Q. (By Mr. Mauritzen) Mr. Hannum, I believe you testified that Mr. Baer did not request that you remain any longer at your kiln, did you not? A. Yes. [382]

Recross Examination

Q. (By Mr. Howlett) Are you sure that that occasion when you went to sleep was not on May 31? A. Was May 31 a Sunday?

Q. Well, I don't know.

A. It was Sunday—on May 31? It was just—no, it was at least a month before the strike.

Q. It was not close to Decoration Day?

A. (Pause) What date is Decoration Day?

Q. That is the 30th.

A. 30th of May—no. [383]

SAM DABICH

called as a witness by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name.

The Witness: Sam Dabich; D-a-b-i-c-h.

Direct Examination

Q. (By. Mr. Mauritzen) Mr. Dabich, have you ever been employed by the company?

A. Yes, sir.

(Testimony of Sam Dabich.)

Q. When did you first start to work for the Los Angeles Brick & Clay Products Company?

A. I started to work on January 2, 1926.

Q. 1926. Are you now employed by the respondent company? A. Yes, sir.

Q. Mr. Dabich, you were subpoenaed to appear in this case, were you not? A. Yes, sir.

Q. You did not come of your own free will?

A. No.

Q. Of what did your work consist prior to the time when the strike was called?

A. What I was doing?

Q. Yes, what were you doing?

A. I was greasing machineries, and changing oil in the motors [384] and taking care of machineries.

Q. And what did you receive per hour while doing that work?

A. When we went on a strike I was getting 50-1/2 cents per hour.

Q. 50-1/2? A. 50-1/2.

Q. And do you recall about how long you had been receiving 50-1/2 cents per hour?

A. Well, we got raised just a little before strike, but now I really, I can't tell how many days I was getting that wages.

Q. At the time of the general raise you were raised to 50-1/2?

A. It was 48 and then we get raised two cents and a half and that would make 50-1/2.

(Testimony of Sam Dabich.)

Q. And you had worked for the company something over ten years? A. Yes, sir.

Q. That was about 11-1/2 years, was it not?

A. 11-1/2.

Q. Are you a member of the union?

A. Well, I pay my initiation.

Q. When did you join the union?

A. I signed up at the first meeting.

Q. The meeting of June 1, 1937?

A. June 1, 1937. [385]

Q. And you paid your dues?

A. I paid my initiation dues.

Q. Did you go out on strike with the other employees? A. Yes.

Q. Did you take part in it? Were you on the picket line? A. Yes, sir.

Q. After the strike had been called off, when did you first apply for reinstatement?

A. I don't remember the date.

Q. Do you know about what date it was?

A. The plant started to operate on 28th of June, and I believe two days later.

Q. Well, it was on or about the 30th?

A. Around the 30th of June. I don't know dates exactly.

Q. And to whom did you apply at that time?

A. Sir?

Q. To whom did you apply?

A. Mr. Bodine.

Q. And what did he say?

(Testimony of Sam Dabich.)

A. Well, he just waved his hand like this (indicating).

Q. Did you ask him what he meant this?

A. Well, I did.

Q. And what did he say then?

A. Well, he told me nothing doing.

Q. And then did you apply for work after that?

[386]

A. Then I see Mr. Larson.

Q. And what did Mr. Larson say?

A. Larson told me they put me on.

Q. Put you on. And then what did you do?

A. Well, next day I went to the plant and they put me on. That was next day after I seen Mr. Larson.

Q. Did you see anybody when you went to work? Did you see Mr. Bodine first?

A. Yes, I see Bodine.

Q. And what did he say to you at that time?

A. Mr. Bodine, he called me in the office and he told me, I am starting in like a new man.

Q. Did he explain that any more?

A. No.

Q. Just said that you were like a new man?

A. Just like new man.

Q. And you had worked there approximately 11-1/2 years? A. Yes, sir.

Q. Did he give any reason why you were starting in as a new man? A. No, sir.

(Testimony of Sam Dabich.)

Q. And what did they pay you when you started in to work for the company again. What wage?

A. After we went on a strike?

Q. Yes. [387] A. 47-1/2.

Q. 47-1/2 cents?

Trial Examiner Stephenson: Off the record.

(Discussion outside the record.)

Q. (By Mr. Mauritsen) And what work were you doing after that?

A. I was setting brick and material for tunnel setting. At first I had been doing everything in the yard, so they started up tunnel kiln. Then after they started up tunnel kiln they put me setting for tunnel kiln.

Q. So when you went back to work you received three cents per hour less than you had before the strike, is that right? A. Yes.

Mr. Mauritsen: You may inquire.

Cross Examination

Q. (By Mr. Howlett) Mr. Dabich, when you went back to work did you have any conversation with Mr. Bodine as being satisfied with what job was given to you? A. No, sir.

Q. Were you satisfied? A. I was.

Q. Do you know who filled the job that you had before?

A. No, I don't think they got anybody on that job.

(Testimony of Sam Dabich.)

Q. During the time you were on the picket line you saw Mr. Bodine, did you? [388]

A. How?

Q. When you were on the picket line was Mr. Bodine at any time very close to you?

A. Yes. He passed, he was going into the yard, sure.

Q. Did you speak to him?

A. No, just hello, that is all.

Q. Did he speak back to you?

A. Well, not only me, he just waved his hand.

Q. Was he looking at you at that time?

A. No, I don't remember.

Q. But he was really close several times while you were there?

A. Well, while I was on the picket line, we were sitting alongside the road there and he was going in and out in the yard and most of the time he waved at us.

Q. So the job you were doing before has never been filled since? A. Not that I know.

Q. You are working there now?

A. At the brick yard?

Q. Yes.

A. Yes, but I am working different department. I never have been down in the other buildings.

Q. Well, you saw Mr. Larson before you went back to work, did you? [389] A. Yes, sir.

Q. And where did you see him?

(Testimony of Sam Dabich.)

A. Right on the crossing going in the yard.

Q. Who else was present, anybody else there?

A. With me?

Q. You and Mr. Larson.

A. Not right there.

Q. And when did that occur? A. When?

Q. What date?

A. I believe it was on 7th of July, or 8th of July.

Q. 1937? A. 1937.

Q. And what did you say to Mr. Larson at that time?

A. Well, I asked him if there is a chance to go back to work.

Q. What did Mr. Larson say to you?

A. Well, he told me he put me on, you go tomorrow morning, so I did.

Q. Was he friendly at that time?

A. Yes, sir.

Q. And did he say anything to you about being in the picket line? A. No, sir.

Q. Did he say anything to you about being a member of the [390] union? A. No, sir.

Mr. Howlett: I think that is all.

Q. Did you say anything further to him about anything? Did you say anything further to Mr. Larson on that conversation?

A. When I was asking for a job?

(Testimony of Sam Dabich.)

Q. Yes.

A. No, sir. Well, I—what did I say? Well, I say, "How is chance to go back to work?" I told him, "Maybe we made a mistake." That is what I told him and he said, "Well, we put you on tomorrow."

Q. You went to work?

A. And I went to work on the 8th or 7th of July. [391]

Redirect Examination

Q. (By Mr. Mauritsen) Now, at the time that you applied [392] to Mr. Larson for reinstatement, did I understand you to say that you thought you had made a mistake by going out on strike?

A. Well, I did say that.

Q. And what did he say? Did he agree with you?

A. Well, he didn't say anything. He just—that is all he did say. They put me on, that is to come and they put me on.

Q. Before he said that, you said that you thought you had made a mistake on going out on strike?

A. Well, I didn't say that we go on strike. I said maybe we made a mistake, and how's chances to get on again? Then he told me, "You go tomorrow. We put you on. You go tomorrow." [394]

GERALD WENKER

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: Gerald Wenker; W-e-n-k-e-r.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Wenker, have you been employed by the respondent company?

A. Yes.

Q. That is the Los Angeles Brick & Clay Products Company? A. Yes, sir.

Q. When did you first start to work for them?

A. The latter part of June, 1936. I don't remember the exact date, but it was just a few prior to the 4th of July; sometime in June, 1936, anyway.

Q. And what work did you first do when you worked for the company?

A. I was a rather handy man, man about, employed in different capacities. Sometimes I turned pipes, and times I wheeled clay in pans, and then if a man happened to be absent or sick, [397] I may take his place, just around one place after another. I did several types of work. I loaded trucks at odd times.

Q. What work were you doing when you were last employed by the company?

(Testimony of Gerald Wenker.)

A. Well, the position I held last was fairly steady, was transfer man for the brick and hollow tile rooms.

Q. And of what did that work consist, that is a transfer man? What do you mean by that?

A. Well, it consists of taking green products away from the shelves, and wheeling them off cars onto the transfer, shunting the cars on transfer, and taking the transfer to the dry tunnels and then placing the cars in the dry tunnels so they can be dried and taken out.

Q. When you say "green products" you mean fresh damp clay as it comes from the presses, in brick or tile?

A. It is the finished product, but it is ready to come from the presses, just been manufactured.

Q. And what wage rate were you first paid?

A. 40 cents an hour.

Q. Did you receive any increase in salary?

A. I received one increase to 45 cents an hour and three or four days prior to the strike, or rather prior to pay day prior to the strike, I received a 2½ cent wage increase, making my wage at the time of the strike 47½ cents an hour. [398]

Q. Now, did you attend the union meeting held June 1st, 1937?

A. That was the first meeting?

Q. The first meeting of the union.

(Testimony of Gerald Wenker.)

A. I did.

Q. Were the four men, Mr. Bodine, Mr. Gantz, Mr. Mills and Mr. Baer present at that meeting?

A. I personally don't recall Mr. Mills, but I recall Mr. Bodine and Mr. Gantz and Mr. Baer were there at least part of the meeting.

Q. And did you apply for membership in the union at that time?

A. I did. I was one of the early card signers.

Q. When did you sign your application card? Was that at the conclusion of the meeting?

A. Conclusion of the meeting. He asked for volunteers to come forward and sign and I was one of the first. In fact I was the fourth to come up and sign the pledge. [400]

Q. Do you recall whether Mr. Bodine or any of these other four men were still present at that time?

A. As I say, with the exception of Mr. Mills, whom I don't recall being at the meeting, the others, Mr. Gantz, Mr. Bodine,—Mr. Baer was there the latter part of the meeting, were there the first part of the signing, that was the first 15 or 20 men anyway that signed; at least that many. I made a note of that at the time.

Q. That they saw that you made application for membership?

A. (Nodding head affirmatively.)

Mr. Howlett: I object to that.

(Testimony of Gerald Wenker.)

Trial Examiner Stephenson: The objection is sustained and the answer may be stricken.

Q. (By Mr. Mauritsen) Mr. Wenker, I believe you said you were one of the first signers of the petition? A. I signed fourth.

Q. And I believe also that you testified that Mr. —that you noted that Mr. Bodine was present there until at least 15 or 20 of the signers had signed?

A. Naturally I wanted to see how much courage certain of the men had under the conditions. I made it a point to remark to some of the men, to see who went up. I also noted very closely that the foremen and superintendent were there when the early signers signed.

Q. Did you attend the meeting on June 5 at which the [401] officers of the union were elected?

A. May I ask for some information on that?

Q. Yes.

A. If that was the meeting that was held over at the Townsend Hall I attended the meeting. If that was the meeting, I attended when officers were elected.

Q. Were you there when—present at a meeting when the union officers were elected.

A. I was.

Q. Were you present at the union meeting held June 9 when the various requests were drafted to be presented to the company?

(Testimony of Gerald Wenker.)

A. (Pause) I attended every meeting but one. I think I missed that meeting. If that was the first meeting held at the pool hall I didn't attend.

Trial Examiner Stephenson: You attended every meeting then except the one at the pool hall?

The Witness: The first meeting at the pool hall. We had several.

Q. (By Mr. Mauritsen) Mr. Wenker, I show you Board's Exhibit No. 2.

A. (Examining document) I didn't attend that meeting.

Q. You were not at the meeting on June 9?

A. That was the one I missed.

Q. When did your employment with the respondent end? [402]

A. It was the second lay-off, I believe June 3.

Q. June 3, 1937? A. 1937.

Q. And who told you that you were laid off?

A. The foreman, Mr. Baer; Mr. Jack Baer.

Q. What did he say at that time?

A. Well, just a few minutes before closing time he told me he was sorry but conditions had forced them to let go some of the men. They were taking some of the men out of the crews that weren't good workers and I fell into that class so he would have to lay me off.

Q. He didn't explain what he meant by "conditions"?

(Testimony of Gerald Wenker.)

A. (Shaking head negatively.) I didn't even talk to him. I just said, "O. K." I asked for no information at all. I knew what was coming so I refused to say anything.

Q. Then he didn't say whether those conditions consisted of union activities or recession or what?

A. Didn't say a word.

Q. Now, Mr. Wenker, I show you Board's Exhibit No. 4. Will you examine it please and tell the Examiner whether your name is attached to that list?

A. (Examining exhibit) It is.

Q. Did you know that this list and the letter had been sent to the company? A. I knew that. [403]

Q. And you had no objection to the including of your name on this list?

A. No. I didn't have any objection.

Q. Were you on the picket line, Mr. Wenker, during the strike?

A. I was on considerably.

Q. Did you see Mr. Bodine and these other foremen pass through the line on their way to the factory?

A. I saw Mr. Bodine and Mr. Larson and lesser foremen.

Q. You saw them any number of times?

A. Several times.

Q. Did you ever speak with them?

(Testimony of Gerald Wenker.)

A. I talked to Mr. Bodine one time for a few minutes, shortly—well, it was when the last lay-off came, the men who had been out on strike were given the notice that owing to conditions they would have to be laid off too, and Mr. Bodine told me to tell any of the men who came to come in and get their checks; that was to me personally.

Q. Is that while you were on the picket line?

A. I was on the picket line then.

Q. Now, at the time when you were laid off, that is I believe on June 3, you said, did you know of any men who had worked at the plant a shorter than you?

A. Well, I had been at the plant—it was fairly near a year all told I worked there, and during that time a consider- [404] able number of men had been put on and a certain number had either been discharged or had quit, and they weren't working there for one reason or another, but I would say for every man that quit since I had been there fully three men had been put on, so though I had been there a short time I ranked fairly well in seniority at the plant. That is my own observation.

Q. Now, you said "a considerable number." Could you give us an approximate figure on that?

A. That is difficult, outside of forming an estimate. Of course, they were put on from time to time, just gradually, they come and go, but I would say

(Testimony of Gerald Wenker.)

there were fully 40 men put on after I was hired. I would say that was a conservative estimate.

Q. Now, Mr. Wenker, do you know whether the job that you held has been filled since you have not been employed by the company?

A. As far—as far as first-hand information is concerned, I can't say, only through hearsay, and I couldn't give anything actually definite on that.

Q. Well, since you transferred products from the presses and so forth to the kilns, it would be necessary, would it not, that the transfer be operated?

Mr. Howlett: Just a minute. I object to that as calling for a conclusion of the witness.

Trial Examiner Stephenson: Overruled. [405]

The Witness: Well, as long as any finished products, any products being manufactured, it would be necessary for some transfer to be running. But, to say—there are three transfers, and anywhere from three to five men that could possibly run; one might possibly run at a time, or three or four might run simultaneously, whatever they are manufacturing, where my job would be filled or wouldn't, but I would say at least part of the time my place would be filled.

Cross Examination

Q. (By Mr. Howlett) Mr. Wenker, you worked for the company less than one year?

A. A little less than a year.

(Testimony of Gerald Wenker.)

Q. And when you first started there what did you do?

A. Well, a handyman, a jack of all trades, not skilled labor; common labor.

Q. How long did you work at that work?

A. (Pause) I would say around three months, as far as I can remember. [406]

Q. Then what did you do?

A. Well, I was practically steady transfer man from then on after. I was—this was just about the time school started, maybe a few weeks later in '37, and I was put on the transfer and three or four of the men went back to school that had been on the transfer, on and off with me, and I was on steady as could be out there on the job as long as the work was demanded I was on the transfer continually with the exception of loading trucks sometimes in the morning or afternoon. We would be called off to load trucks. I kept the steady transfer man around eight months there.

Q. You worked at that particular work until you left? A. Yes, sir.

Q. There were three transfers you worked on?

A. Well, there were two I worked on steady, the middle transfer, the hollow—the roof tile transfer I worked on occasionally. [407]

Q. And just when did they leave first? You didn't see Mr. Mills. When did Mr. Bodine leave?

(Testimony of Gerald Wenker.)

A. Well, he left sometime during the applications, after the first applications were in. [410]

Q. You have been working on odd jobs since you left there? A. Different places.

Q. Where?

A. One thing, I have a place I take care of, quite an estate, across the lake. [416]

How many men were employed after you had been employed that were doing the same type of work that you were doing at the time you left your employment?

A. You mean in regard to transfer work?

Q. Yes.

A. That would take a little thinking to try and recall. (Pause) Well, when I first came to the plant there was one steady dry transfer man on our end. He is called Tommy, a Mexican boy.

Q. What is his name?

A. Tommy. I don't remember his last name. He worked on the hollow—on the roofing tile machine. They run roofing tile most. As far as the other transfer people, using transfers at our end, to my knowledge I was the first steady man on that transfer from the time I was employed, and from then on I held the job steady on that end.

Well, after that, there was one man put on the dry press steady, first Mr. Louis Juarez, he was put on the floor as pipe finisher and then Mr. Hannum was the next man that was really steady on that

(Testimony of Gerald Wenker.)

press, the dry press. I was the only steady man on my transfer. [418]

Q. (By Mr. Mauritsen) Mr. Wenker, did you work steadily up until the time you were laid off?

A. Outside of last winter, which was an exceedingly wet year and in the plant naturally we lose a certain amount of time, but outside of that I was what you called very steady on the job. [420]

GUSTAF LARSON

a witness recalled for and on behalf of the National Labor Relations Board, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination

Q. (By Mr. Mauritsen) Now, Mr. Larson, I believe you testified the other day that you had carried on your negotiations with the employees at the plant individually, is that correct?

A. Well, whenever there had been things to take up with the employees, it was individuals.

Q. And you never bargained with them as a group, or as the entire membership, merely as individuals? A. That is correct.

Q. And that had been during the entire period of time that you were there? [424]

A. Yes, sir.

(Testimony of Gustaf Larson.)

Q. You found that method of negotiation satisfactory, did you not? A. I did.

Q. So that you preferred that method of negotiating with your employees? A. I did.

Q. That is, it was entirely satisfactory, and you saw no reason to change?

A. I had no other way; never been asked me to ever bargain collectively by any group of men.

Q. So that when this petition was presented to you, you immediately took it up with Dr. Nylander?

A. I took it up with Dr. Nylander before any petition was ever made, wrote to me.

Trial Examiner Stephenson: I don't believe the witness understood which petition you referred to, Mr. Mauritsen.

Q. (By Mr. Mauritsen) This petition that was presented to you out at the plant on the 10th of June. I will show you Board's Exhibit 2. That is the petition to which I refer.

A. I took it up with Dr. Nylander the following Tuesday.

Q. But, in other words, you didn't take it up with the workers, you were willing to take it up with Dr. Nylander, but not with the workers?

A. Why, I had to—I had no way to take it up with the [425] workers. When I came the following day, they were all on the picket line. I had no men in there.

(Testimony of Gustaf Larson.)

Q. Now, as I understand it, you were at the plant at about ten a. m., were you not?

A. Yes.

Trial Examiner Stephenson: Of what day?

The Witness: The day that petition was handed.

Trial Examiner Stephenson: The day the petition was handed to Mr. Bodine, in the morning. You were there the same morning at ten o'clock?

The Witness: Yes.

Q. (By Mr. Mauritsen) Mr. Bodine told you of the petition immediately upon your arrival?

A. Yes.

Q. You were told—you said you had no opportunity that day to take it up with the workers?

A. I had no way to answer the demand like that. I had no authority to answer a demand like that.

Q. Well, now, what position do you hold with the company, Mr. Larson?

A. General superintendent.

Q. Did you also testify that you were the largest stockholder? A. I was.

Q. That you were a director of it? [426]

A. I am.

Q. Of the company? A. Yes.

Q. Now, what, in your capacity as general manager, what authority do you have?

A. Well, I have general authority, any business that comes along, what that demands, that has got to be taken up by the Board.

(Testimony of Gustaf Larson.)

Q. Well, now, was it possible for you to speak with the men as general manager?

A. Well, but if I did, I couldn't answer anything that was in that demand.

Q. I mean, couldn't you, if a group of men came to you and said they wanted to confer with you, as employees, as general manager, could you talk with them? Now, just talk with them.

A. All right. Let me hear the question.

(The pending question was read by the reporter as set forth above.)

The Witness: Absolutely.

Q. (By Mr. Mauritsen) In other words, it didn't take an act of the Board of Directors for you to talk with them? A. Sure.

Q. As general manager you had that authority?

A. No, I could talk to them.

Q. I mean you could talk with them? Could you? [427] A. Yes, sure.

Q. And you could then confer with the board of directors and find out whether they would meet any request the workers made, couldn't you?

A. I could, but there was no group of men.

Q. I mean, just as a general proposition, not referring to any specific instance.

A. If a group of men had come to me, I certainly could have talked with them.

Q. But you had the authority to confer with the employees if they requested it?

(Testimony of Gustaf Larson.)

A. To listen to their demand.

Q. Now, as general manager of the company, would you have authority to grant a general pay increase?

A. I am not a general manager. I am general superintendent.

Q. Well, is there a general manager?

A. No.

Q. So that as general superintendent, you fulfill approximately the same office?

A. I practically do.

Mr. Mauritsen: Will you read the question?

(The record referred to was read by the reporter as set forth above.)

The Witness: No, sir.

Q. (By Mr. Mauritsen) That would have to be taken up by [428] the board of directors, would it not? A. Yes, sir.

Q. Was a general pay increase granted at the —strike that.

Was a general pay increase granted the employees on the first of June?

A. No. It was granted in the middle of April.

Q. But it was to become effective the first of June?

A. For me to us my judgment.

Q. And in your judgment conditions warranted the grant on June 1?

A. I wanted to be sure first, to find out whether the other clay product companies had—they had

(Testimony of Gustaf Larson.)

both raised the wages, and I found out how they had done it, so as soon as I found out, I raised the minimum, the same as they did, and all the way up the line. That is the reason—I couldn't find out by May 1, and it took to June 1.

Q. Oh, I see. The Board of directors then authorized you to make a study and then, when the conditions warranted it, to make the increase when you thought it best? A. Yes.

Q. Was the meeting of the board of directors held in April that authorized that increase?

A. It was.

Q. And in your opinion June 1 was the proper time for the [429] increase to go into effect?

A. I found out from the other clay products how much they had raised, and as soon as I found it, I done it. I increased it June 1. I found out the middle of June, or maybe the first part of June.

Q. You said "June." Is that—do you mean May? A. May.

Q. I didn't—did you have anything further on that? I didn't mean to interrupt you.

A. No.

Q. I wanted to check that date.

Now, as general superintendent, did you have authority to designate the men who would be laid off and men who would be hired?

A. I did, but I give that instruction to Mr. Bodine.

(Testimony of Gustaf Larson.)

Q. You instructed him as to who was to be laid off?

A. I instructed Mr. Bodine to lay off all the men that were last hired, except for efficiency,—if we had a better man, even if the last man we had, and he was a good man that was valuable to us, to keep him and keep as many as possible of the machine men so we could start more units. That is the reason that more men was laid off in the yard, outside men, then there was in the machine men.

Q. Now, did it take a meeting of the board of directors to authorize you to do that, or just how did you receive that [430] authority?

A. I used my own authority there.

Q. You used your own authority there, so that in some instances when you acted you were authorized by the board and in some you just used your own judgment? A. That is correct [431]

Q. Now, referring to this conference held in Dr. Nylander's office, at the time when the representatives of the union were present, just what took place at this conference, Mr. Larson? [438] Can you tell the Examiner? A. I can.

Q. Did you arrive there before the employees?

A. I did.

Q. Did you talk with Dr. Nylander?

A. I did.

Q. And what did you discuss with Dr. Nylander?

(Testimony of Gustaf Larson.)

Trial Examiner Stephenson: Pardon me. Before you answer, was anyone else present besides you and Dr. Nylander?

The Witness: No.

Trial Examiner Stephenson: All right.

The Witness: Dr. Nylander said that the employees were in from Alberhill plant. That meeting was June 23. I believe it was the 23rd or 24th. Dr. Nylander said there was a committee here from Alberhill and they wanted to be—wanted all the men put back and rotate the work. I said that is not practical and can't be done. Furthermore, our business, we can't take all the men back because on account of lack of manufacturing orders.

I explained, I told him that we had no orders to make. We had material to send out, and right then the men come in.

Q. (By Mr. Mauritsen) Then what took place?

A. He said, "Boys, I can't do anything for you. You struck. You were the leaders. You told your men something that can't be lived up to. You got no right to run their business. [439] Mr. Larson has told us his story and I believe it is true. If I didn't believe him, I got ample means to find out whether it is so or not."

Mr. McNutt spoke up and he said, "There wouldn't be any need of laying off men if the business was run right, if he put union labor, and all the material would sell itself."

Dr. Nylander said, "Well, boys, if you know so much about it, why don't you all go out and sell the

(Testimony of Gustaf Larson.)

material? I am sure Mr. Larson would pay you a reasonable commission."

I said, "I am willing to sell it at the regular price."

One man spoke up and I think it was—I am not certain, but I think it was Mr. Hannum, and he said, "Bull. What do we know about the business?"

Q. (By Mr. Mauritsen) What happened?

A. So McNutt said—they wanted—we had then a lot of men back, workers hired on seniority, and I asked Mr. McNutt, "How long have you been working for the company?"

He said, "Five months."

I said, "What chance have you got to get back in seniority, when only need at most 150 men?"

Q. Then what?

A. And that ended the whole thing. He said, "Well, boys—" no, he didn't. Dr. Nylander said, "Boys, I can't do anything for you, but when they re-hire and start up the plant, I will see that seniority prevails," and that ended the meeting. [440]

Q. You didn't take a large part in the conversation, did you? You didn't say very much?

A. Well, I told you what I did say. [441]

Cross Examination

Q. Was that the meeting that you had reference to as having had with Dr. Nylander, the first meeting you had with him?

(Testimony of Gustaf Larson.)

A. No, that was the last or the next to last. I believe I testified last meeting that this was the last, but I believe that Mr. Stuart and I went back up there the last time. That was after the men was back. I think I did.

Trial Examiner Stephenson: Might I interrupt for just a moment. How many meetings did you have altogether with Dr. Nylander?

The Witness: Four; four meetings.

Trial Examiner Stephenson: And it was at the third meeting that the representatives of the union were present? The Witness: That is correct.

Trial Examiner Stephenson: All right.

Q. (By Mr. Howlett) When was meeting No. 1? A. It was the 16th day of June.

Q. Where was that held?

A. In Nylander's office.

Q. Who was present?

A. Nylander and myself.

Q. And how did you happen to go in on that occasion?

A. I asked for a meeting, asked our office to make an appointment. I wanted to see him. I wanted advice as to what to do.

Q. And what advice did you ask him? [445]

A. I brought that demand and handed it to him.

Q. Referring to——

Trial Examiner Stephenson (Interrupting): Board's Exhibit No. 2.

(Testimony of Gustaf Larson.)

Q. (By Mr. Howlett) Board's Exhibit No. 2.

A. He read it and handed it over to Mr. Howard. He said, "That strike is illegal." They can't do that.

"Well," I said, "They are doing it."

So we talked just a few minutes and he excused himself, had to go to another meeting, and he told me to go in with Mr. Howard. In the meantime Mr. Howard had left and went in his office. I went in there and Mr. Howard said, "I just called up the union headquarters here in Los Angeles. They told me that they had never authorized the union to strike, and it was illegal, and they would call the strike off if I take all the men back to work and have an election with the Government supervising the election."

I told him, "It can't be done. The men is out. The place is closed down. We had a big loss, and with the assurance that we would get, if the men come back to work, they wouldn't do the same thing the next week again——" I referred to the burners, if they wouldn't go off and leave us the same thing.

Before Nylander left he said, "Mr. Larson, I am going to San Diego over the week-end, and I will make a point that [446] I am going to drive by Alberthill and have a talk to the men." Whether he did do it or not I never asked him.

Q. Well, you went to see Dr. Nylander for advice? A. I did.

(Testimony of Gustaf Larson.)

Trial Examiner Stephenson: Off the record.

(Discussion outside the record.)

Trial Examiner Stephenson: Gentlemen, may it be stipulated that the Mr. Howard referred to by the witness in his testimony is Maurice Howard, Chief Field Examiner for the National Labor Relations Board, Twenty-first Region?

Mr. Howlett: So stipulated.

Mr. Mauritsen: So stipulated.

Q. (By Mr. Howlett) Did you have an occasion, or did you know the provisions of the Wagner Act at the time you went to see Dr. Nylander?

A. Didn't know anything about it.

Q. What did you go there for?

A. For advice, what to do.

Q. In regard to the difficulties that you were having at the Alberhill plant?

A. In regard to that demand, the difficulty.

Q. And did you get advice from him other than what you have stated? A. No.

Q. When was the next meeting that you had with Dr. Nylander? [447]

A. It was two or three days after; Mr. Prussing and myself went up there. He is our secretary.

Q. And who was present at that meeting?

A. First Dr. Nylander, Mr. Prussing and myself, then he sent us in to see Mr. Howard, and Prussing and myself.

(Testimony of Gustaf Larson.)

Q. What happened at that meeting?

A. Nothing happened except Mr. Howard wanted us to take all the men back and put them all back to work and have an election and be able to supervise the election.

Q. What conclusion did you come to about taking all the men back to work?

A. We couldn't handle it; had no need for that many men.

Q. Did you tell him that?

A. I told him that.

Q. What did he say?

A. Nothing. That was all there was to it.

Q. And did he give you any further advice?

A. No.

Q. Then the fourth meeting was the meeting in which the members were present?

A. Yes, sir.

Q. Strike that—the employees were present?

Mr. Stuart: That is the third meeting.

Q. (By Mr. Howlett) That is the third meeting and your [448] fourth meeting was when?

A. That was after we started operating, that was the following week, that was the 27th or 28th or 29th, I don't remember.

Q. What month? A. June.

Q. 1937? A. Yes, sir, 1937.

Q. And who was present at that meeting?

(Testimony of Gustaf Larson.)

A. Mr. Stuart, myself, and Dr. Nylander, I believe it was. I think it was Howard. I don't know if Dr. Nylander was there.

Q. What was the purpose of that meeting?

A. I was called there. At that meeting I was called to that by Nylander.

Q. And what did you do there?

A. The same thing as before.

Q. What did you discuss?

A. About taking all the men back and have an election.

Q. Nothing was accomplished at that time?

A. We already had the men back. We had 100 men, 115, something like that. [449]

Q. Did you, at any time in your discussion, in talking with the workers, ever tell them they could not join a union? A. Never did.

Q. What is your opinion about unions?

A. Unions is all right, if properly run.

Q. Did you ever suggest to them they form a company union or an employees' union?

A. No, sir.

Q. Did you ever tell them that you would favor to see the A. F. of L. in charge rather than the C. I. O.? A. No, sir.

Q. Did you ever have any information as to the number of men, if any, that were in the union?

A. No, sir, never knew there was one or whether 100. [451]

(Testimony of Gustaf Larson.)

Q. Do you know today?

A. No, I don't, except what I heard here.

Q. Those cards were never shown to you before?

A. No, sir. [452]

Q. What were your relations with Dr. Nylander?

A. Very friendly; couldn't be any better.

Q. He gave you good treatment?

A. Certainly did.

Q. And the conference was entirely friendly?

A. Absolutely.

Q. Do you respect him for his judgment?

A. I certainly do.

Q. And *was* is your opinion concerning this particular matter of the handling of labor which may be designated as the new deal legislation?

A. I think it is all right.

Q. Do you agree with it?

A. In some way I do.

Q. Will you explain that?

A. Well, I think when unions definitely go beyond their demands, that they try to tell you how many men to work, and [453] that you divide up the work to them, amongst them, when it is not practical, and give you 24 hours' notice or close down the plant, I think that is unreasonable and they ought not to demand that. If the men had come like men, in a committee, and say, "Here, we have a

(Testimony of Gustaf Larson.)

grievance,'' they wouldn't have had any trouble. We would have had a conference. I would have said, ''Well, this is beyond me, but I will take it up with our board at the next meeting. You boys go ahead and keep at it, and we will see what we can do, and I will let you know after our next directors' meeting,'' but that demand is beyond me. I couldn't answer that.

Redirect Examination [454]

Q. (By Mr. Mauritsen) Now, at the time you first conferred with Dr. Nylander, when you took Board's Exhibit 2 to him, did you explain to Dr. Nylander that there was a petition presented by the union, and that you had made no attempt to confer or negotiate with the union when you presented that petition to him? [456] A. I did.

Q. You did?

A. I told him, I said, ''This comes just in an opportune time because we got no manufacturing orders, and we are forced to lay off men. We close one or two months, or maybe longer.'' Now that was with Howard, but at the same meeting, see? [457]

Recross Examination

Q. Did you and Mr. Bodine ever speak about a union, have any conference on unions?

A. Many times.

Q. Around June 1? A. No doubt.

Q. And what was the nature of those?

(Testimony of Gustaf Larson.)

A. I can't tell you that. I talked about unions, many of them, but if you asked me about a certain meeting, why I couldn't tell you.

Q. Did Mr. Bodine tell you he attended a union meeting? A. Never did. [459]

Q. He didn't tell you? A. No.

Q. You didn't know anything about him attending a meeting? A. No.

Q. You didn't tell him that a union was coming into the plant?

A. I told him let them organize. I never had anything against them. [460]

Q. You testified here the other day that you would not have Hannum back to work on account of finding him asleep on top of the kiln?

A. That is correct.

Q. Why did you not fire him when you found him asleep on the kiln? Why did you wait a month and still not fire him?

A. I did not wait a month. I waited two or three days.

Q. The man was still working there until the day he walked out on strike.

A. When I caught that man asleep Sunday after Decoration Day, May 31, and the following Monday I took it up with Jack Baer, the foreman there. We was considering what man we were [461] going to put in his place. We couldn't decide that right in a hurry, and he went on strike a few days after.

(Testimony of Gustaf Larson.)

Q. It was eleven days elapse between the time he went on strike and Decoration Day—12 days.

A. Well, even so, it costs money to break in a man. We want to be sure to get a man better than that what we had. We tried to pick one. [462]

Recross Examination

Q. (By Mr. Howlett) Do you have it in your mind now, or ever had it in your mind, any particular objection to this union, or the men joining it?

A. None whatever.

Q. Have you ever so expressed yourself?

A. No, sir.

Q. You feel that way today? A. I do.

Q. Do you feel that any of the men, by reason of their union activities, or what they did, should be kept from their jobs if you had work?

A. None of them are kept from work on that account. [464]

Q. (By Mr. Stuart) Mr. Larson, as a matter of fact, after reading these cards here, and finding out who are in the union, do you know whether you have taken back any union men or not?

A. Well, all those men is union men—I will change that—all the men we employed now is all the men we had before the strike, with the exception of 16 or 17, and other than those 16 or 17, there is one mechanical engineer—he is a draftsman——and another one is a brick-setter, see? The rest

(Testimony of Gustaf Larson.)

are clay-diggers, Mexicans, that none of these American boys would qualify or take the job.

Recross Examination

Q. (By Mr. Gately) Did you ask any of these boys if they would take the job?

A. I haven't asked. I don't handle them.

Q. Do you know if they were ever asked if they would take those jobs? A. I don't know.

Q. Why do you decide that they wouldn't take them?

A. Well, if they did take them, they couldn't qualify. These boys wouldn't work in a clay-pit, in the sun down in the [465] clay. We had an experience, and we know that it don't work; they can't qualify for a job like that.

Q. Is that something extra heavy or of extra skill?

A. Well, pick and shovel in the clay pit in the summer time when the weather is hot, it takes a pretty good man for that kind of work.

Q. Is it your impression there ain't no good white men?

A. For that job, and I believe you will agree with me.

ARTHUR O. BODINE

a witness called for and on behalf of the National Labor Relations Board, having been first duly sworn, testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: Arthur O. Bodine.

Trial Examiner Stephenson: And will you spell it? [466]

The Witness: B-o-d-i-n-e.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Bodine, how long have you been employed by the Los Angeles Brick & Clay Products Company?

A. Since February 1, 1931.

Q. Of what did your duties consist when you were first employed by Respondent?

A. Well, consisted of being, for a while, a sort of what we term as a working foreman.

Q. And does that imply that you worked with the men, and there were foremen at the same time?

A. That is pretty much right.

Q. And how long have you occupied your present position with the company?

A. Well, I believe since 1934. I think about November, I believe. I am not sure about that now.

Q. What is your present position with the company? A. Plant superintendent.

Q. And of what do your duties now consist?

(Testimony of Arthur O. Bodine.)

A. My duties consist of supervising the operations of the plant under the supervision of Mr. Larson, and his direction, you might say.

Q. You have general charge of hiring and firing men, do you not? A. Yes, sir. [467]

Q. Do you confer with Mr. Larson when a man is to be discharged from the company, or do you do that upon your own initiative?

A. Well, except in very rare occasions I probably would just use my own judgment.

Q. So that generally speaking you would say that you have control of hiring and firing the men?

A. Yes.

Q. Now, let me see. I believe you showed me, the other day, certain records regarding the number of employees that you have, did you not?

A. Yes, sir.

Q. I wonder if you could let me see those records again, your time book and that list of all of the men, with the numbers, I believe from May 1 until July 1.

A. In that book we were looking at?

Q. Yes.

The Witness: May I be excused to get that?

Trial Examiner Stephenson: Yes.

(Witness obtains book.)

Q. (By Mr. Mauritsen) Now, what is the record that you now have in your hand? Is that a record you keep personally?

(Testimony of Arthur O. Bodine.)

A. No, this is a record that is kept by our office man, taken from the payroll account which summarizes the period during the months as to the fluctuations in our personnel. [468]

Q. And that is from the beginning of 1937, is it not? A. Yes, sir. [469]

A. We had 163 at the beginning of April.

Q. At the end of April how many did you have?

A. 168.

Q. So that you again hired five more men during the month of April, did you not?

A. That is right.

Q. And during the month of May, at the beginning of May, how many men did you have?

A. 166—at the beginning—168.

Q. 168 men. And at the end of May how many men did you have? A. 166.

Q. 166 men? A. Yes.

Q. So that during the first five months, on the whole, you were employing more men than you had in succeeding months, did you not?

A. Yes.

Q. That is not many, but you were employing men during that period.

Now, at the end of July, how many men did you have employed, by your records? A. 146.

Q. And by the end of August, how many men did you have [470] employed, by your records?

A. 153.

(Testimony of Arthur O. Bodine.)

Q. And by the end of September, how many men did you have employed, by your records?

A. 154.

Q. So that by the end of August, you were employing perhaps 12 or 13 men less than you were during May, is that not true?

A. Yes, that is true.

Trial Examiner Stephenson: All these months that you have been referring to are in 1937?

Mr. Mauritsen: 1937.

Q. Now, Mr. Bodine, are you satisfied as to the accuracy of that record?

A. That record is accurate.

Q. If there were any variations, it would never be more than one or two men?

A. There would not be.

Q. Now, do you have that other list?

(Discussion outside the record.)

Q. (By Mr. Mauritsen) Now, Mr. Bodine, did you attend the meeting of the union held on June 1, 1937, at the American Legion Hall?

A. Yes, sir.

Q. Were you invited to attend that meeting? [471]

A. Well, I wasn't invited, only as the rest of the employees. We had a lot of handbills right around the office, and they was around the plant telling of the meeting, and it is the only invitation; no personal invitation.

(Testimony of Arthur O. Bodine.)

Q. Do you know anything about unions, Mr. Bodine? A. About unions?

Q. Yes.

A. Never belonged to a union in my life.

Q. Never have? A. No, sir.

Q. Do you know whether a superintendent of a plant would be eligible for membership in a union?

A. Well, I know now, from what I have heard, that I wouldn't be eligible as a voting member.

Q. In other words, you knew that you were ineligible to membership?

A. I didn't know at that time, because I didn't know what were the requirements of a person to get in a union.

Q. What was your purpose in attending the union, the meeting of the union held June 1, 1937?

A. Well, I guess more for curiosity than anything else. And, being a member of the American Legion, and the meeting being held in the American Legion Hall, I felt like—

Q. (Interrupting): You were entitled—

A. (Interrupting) —I wouldn't be out of order by walking [472] in and if I was, I probably would be told to get out, and then I would do that very agreeably.

Q. Being general superintendent, you are naturally interested in any activities that the men might be carrying on, weren't you?

(Testimony of Arthur O. Bodine.)

A. Well, not necessarily from that standpoint, just personal curiosity, more than anything else. [473]

Q. Now, Mr. Bodine, about how many men would you say were present at that meeting?

A. Well, that I don't know as I could estimate very close on that. Probably there were in the neighborhood of 65 men.

Q. About 65 men.

How many of these men applied for membership? A. That I do not know.

Q. But you were there at the conclusion of the meeting when the organizer asked for applications, and let them sign blacks, were you not?

A. As soon as the speaker had finished and had gone into that part of the meeting, why, then I was through.

Q. Then what happened after the meeting was over? What did you do? A. I went home.

Q. Went home.

Did you see other of the foremen of the company present at that meeting?

A. Well, I saw Mr. Gantz, Mr. Mills, and I saw Mr. Baer as I got outside. I believe it was outside that I saw him.

Q. They were also present at the meeting?

A. Yes.

Q. You saw them there. Now, when did you advise Mr. Larson [475] that the union was being formed in the plant?

(Testimony of Arthur O. Bodine.)

A. Well, I don't just recall the time that it was. It was some time after this meeting.

Q. After the first meeting, of course?

A. Yes.

Q. Well, what did you advise him—was it a month after the meeting was held?

A. No, it was less than that.

Q. Less than that. Within the next day or two, as a matter of fact, wasn't it?

A. Probably within the next three or four days. I don't just recall how it was. It was on some one of his visits following that.

Q. You were rather hazy on that point then. In other words, it could have been the next day, so far as you recall?

A. (Pause) Well, it may have been the next day, as far as I can say.

Q. You didn't advise him that night, though?

A. No, I couldn't, because—this was a thing that was evident. We had handbills around the place and handbills were not picked up. They were just left as they had been distributed around, and they were probably visible all along the road coming into the plant. Anyone would know we were having some union activity.

Q. Now, Mr. Bodine, regarding these lay-offs that occurred [476] beginning June 2, 1937, who advised you as to the men to be laid off?

A. Well, I am pretty much the one who took care of that.

(Testimony of Arthur O. Bodine.)

Q. Did you—

A. (Interrupting) Of course, with the suggestion of Mr. Larson, that we keep the men, the oldest men, from one standpoint, and the standpoint of their value to the company from the other.

Q. Well, Mr. Larson advised you as to the men to be laid off then, didn't he?

A. Not necessarily by name, not by name.

Q. Well, how did he designate those to be laid off?

A. Well, by specifying them as a machine crew and a setting crew, and those.

Q. But he told you that some men were to be laid off and left it up to your judgment, did he not? Is that right? A. Yes.

Q. Now, Mr. Bodine, you have had considerable experience in handling men, in firing and hiring them over a number of years, have you not?

A. Yes.

Q. So that all things being equal, you have found it in your experience, have you not, that men who have been doing the work are better qualified to do that particular work than anyone who is entirely inexperienced, is that not true? [477]

A. Please state that question again.

Trial Examiner Stephenson: Read the question, Mr. Reporter.

(The pending question was read by the Reporter as set forth above.)

(Testimony of Arthur O. Bodine.)

The Witness: That is not true, if I understand the question correctly.

Q. (By Mr. Mauritsen) Then it has been your experience that men who have had absolutely no experience are better qualified to do the work than men who have been working at it some time, is that true?

A. Well, there are exceptions, of course, that cover that. For instance, some men are more progressive, more industrial, and some are more physically fit for certain work, and those are the things I have in mind as deciding whether the man who has been working at something would be more qualified than the man who has not, where no practical experience is necessary. That is what I am getting at.

Q. My original question was, that all things being equal, a man of equal intelligence and equal strength, and equal ability, that the experienced man would be better qualified, would he not?

A. He should be in that case. [478]

Q. Now, at the time when these union men were returned to work, as a condition of their re-employment, request that they engage in no further union activities? [483]

The Witness: Did I inquire? I did not.

Q. (By Mr. Mauritsen) Did you require that as a condition of their re-employment?

A. No condition.

Q. (By Mr. Mauritsen) Did you or did you not make a statement to Mr. Dabich that he was

(Testimony of Arthur O. Bodine.)

beginning as a new man when he applied for reinstatement?

A. I can't recall as having made such a statement. But, if I made such a statement, I would have meant by that that coming back as a new man, he would have to take the job we had [484] open for him, and we didn't, we couldn't put him back on the job he had been on.

Q. Did you mean thereby that he lost any seniority that he might have had at the plant?

A. No; no.

Q. In other words, you, although he had gone out on strike, still regarded him as an employee of the company, did you not?

A. The same seniority as he had when he went out. [485]

Q. (By Mr. Mauritsen) Well, these men who were laid off beginning June 2 to June 9, inclusive, did you consider that they were being merely temporarily laid off, or were they being permanently discharged?

A. I considered them as being temporarily laid off.

Q. So that you still considered them as employees of the company, merely——

Mr. Howlett (Interruping): I object——

Trial Examiner Stephenson: (Interrupting) Finish your question.

Q. (By Mr. Mauritsen) ——being temporarily out of work?

(Testimony of Arthur O. Bodine.)

Mr. Howlett: I withdraw that objection.

The Witness: Yes.

Q. (By Mr. Mauritsen) Now, Mr. Bodine, did you, or did you not, receive the petition of the workers on June 10, 1937?

A. That is this document?

Q. I am referring to Board's Exhibit No. 2. [486]

A. I did receive that.

Q. What time of day did you receive that on June 10?

A. Oh, that was some time shortly before seven-thirty, probably seven-twenty, something of that sort.

Q. Did you take——

A. (Interrupting) A. M., that is.

Q. Did you take any action in regard to that petition?

A. Any action I took was to hand it to Mr. Larson when he arrived at the plant. [487]

Q. But he was here about ten o'clock on that day. What did you do when he arrived at the plant? A. I handed him this letter.

Q. And what did he say to you then?

A. He said—he read it over and said, "Well", he says, "I can't do anything about that until I take it up with the directors."

Q. Did he ask you about the men who had signed the petition?

A. No, not to my knowledge. [488]

(Testimony of Arthur O. Bodine.)

Q. Showing you Board's Exhibit 2, do you know the men who signed the petition?

A. Yes, I know them.

Q. You knew they were employees of the plant, did you not? A. Yes.

Q. So that this wasn't a chance you just thought it was a petition given you by an outside interest, or something like that?

A. No, I realized it must be authentic. It was brought in and handed to me by Mr. Lucas who was an employee.

Q. Did you see Mr. Lucas at the meeting of June 1? A. I don't recall seeing him there.

Q. But you realized there might be a union in the plant having been at the meeting June 1, did you not?

A. I realized that there probably would be a union.

Q. And then you showed it to Mr. Larson, and what did he say?

A. After having read it, he said he couldn't do anything about that until he could—I don't recall whether he said call a directors' meeting, or take it up with the directors. Take it up with the board of directors, I think, is probably the way he put it.

Q. Did you suggest that he take any action at that time on the petition? A. I did not. [489]

Q. You were perfectly willing the men should go out on strike without making an effort to confer with them?

(Testimony of Arthur O. Bodine.)

A. I wasn't—not knowing what the law might be in a case of that kind, I couldn't say. I couldn't advise anybody what to do in that case. In fact, it called for an asnwer so soon, it just kind of had me bewildered to know what we were going to be able to do about it.

Q. You received that at seven-thirty in the morning, approximately? A. Yes, sir.

Q. And you knew—strike that.

So that you thought it necessary to think it over more than one day?

A. When I turned that letter over to Mr. Larson, and he informed me that he couldn't do anything about it at that time, until he consulted with the directors, or he said that he had to call a directors' meeting, that eliminated me from even giving a thought about the thing, that I might be able to do anything about it. If he didn't have the authority to act on that, I knew that I didn't.

Q. Now, you have been here during the course of the hearing, have you not? A. Yes, sir.

Q. Now, Mr. Lucas testified that late in the day of June 10 that he had a conversation with you respecting the presen- [490] tation of this petition, and concerning unions. Do you recall such a conversation? A. I do.

Q. And what did you say to Mr. Lucas at that time?

(Testimony of Arthur O. Bodine.)

A. I went out to the machine shop where Mr. Lucas was working, and told him that I had taken this matter up with Mr. Larson; that Mr. Larson stated that he couldn't do anything until he had either consulted with the board of directors or called a directors' meeting, one of the two. I don't recall just how he stated it, but it was in reference to taking this matter up with the board of directors.

Q. Did you say anything in that conversation about unions? A. I did not.

Q. Made no statement? A. No, sir.

Trial Examiner Stephenson: Are you through interrogating the witness at this time in regard to Board's Exhibit 2? Are you going to pass on to something else at this time? If you are, I have some questions in regard to that that I would like to ask now.

Mr. Mauritsen: Go ahead.

Trial Examiner Stephenson: Mr. Bodine, who handed you Board's Exhibit 2?

The Witness: That is the paper you have?

Trial Examiner Stephenson: That is the paper I have in [491] my hand.

The Witness: Mr. Lucas.

Trial Examiner Stephenson: Did you read it while he was standing there?

The Witness: Yes, sir.

Trial Examiner Stephenson: Did you make any comment to him at the time?

(Testimony of Arthur O. Bodine.)

The Witness: I told him that I couldn't do anything about that; that I would have to take it up with Mr. Larson.

Trial Examiner Stephenson: Did you say anything to him at that time about the shortness of the time in which to act?

The Witness: I don't recall having made any comment on that.

Trial Examiner Stephenson: You just told him you would take it up with Mr. Larson?

The Witness: I remember distinctly telling him that I would have to get it over to Mr. Larson.

Trial Examiner Stephenson: Then after having taken the matter up with Mr. Larson, you told Mr. Lucas that nothing could be done until there was a meeting of the board of directors, is that right?

The Witness: I told Mr. Lucas that Mr. Larson told me that he couldn't do anything about that until he had—was either consulted with the directors, or called a directors' meeting. [492]

Trial Examiner Stephenson: At that time did you ask Mr. Lucas to give you more time in which to consider the matter before they went out on strike?

The Witness: No, sir. It didn't occur to me.

Trial Examiner Stephenson: Did you, after receiving this Board's Exhibit 2, get in touch with Mr. Hannum, the president, the man who signed his name as president, or McNutt, who signed his name

(Testimony of Arthur O. Bodine.)

as secretary-treasurer, and ask them to give you more time in which to consider the matter?

The Witness: No, sir.

Trial Examiner Stephenson: Did you discuss the matter with either Mr. Hannum or McNutt at that time, or that day, either before you took it up with Mr. Larson or afterwards?

The Witness: No, sir.

Q. (By Mr. Mauritsen) Now, Mr. Bodine, I show you Board's Exhibit No. 3. [493]

A. (Examining document)

Q. Having examined the letter, have you ever seen the original of that letter?

A. I believe that Mr. Larson brought that out from Los Angeles and showed it to me.

Q. So that as far as you know, this was never received at the plant?

A. You mean signed for?

Q. The original.

A. Mailed direct to the plant. No.

Q. I show you Board's Exhibit 4. Have you ever seen the letter of which that is a copy?

A. (Examining exhibit) Now, I guess I will have to state that I know I seen one letter. I guess this is the one I saw rather than that one.

Q. That was received by you at the plant?

Trial Examiner Stephenson: Referring now to Board's——

Mr. Mauritsen (Interrupting): 4.

(Testimony of Arthur O. Bodine.)

Trial Examiner Stephenson: 4.

The Witness: Well, I can't answer yes-or-no, because I don't recall receiving it. I recall this. That—this must be the one I saw. Two communications I saw, and I think this is the one.

Q. (By Mr. Mauritsen) You never received it directly at the plant? [494]

A. I don't recall that. I recall the first communication; received that definitely.

Q. Now, which exhibit do you recall Mr. Larson showing to you?

A. Well, I am inclined to think it was this one.

Trial Examiner Stephenson: Referring to Board's Exhibit 4.

The Witness: 4, the application for re-employment. To the best of my knowledge that is the one.

Q. (By Mr. Mauritsen) And the letter that now has the list of names attached to it?

A. Yes.

Q. Now, while the strike was in progress, did you make any attempt to get the men to come back to work? A. I did not.

Q. While the strike was in progress, you merely went to and from work as had been your custom before the strike, did you not? A. Yes.

Q. You made no attempt to get the men to come back to work. Did you instruct anyone to make an attempt to get the men to come back to work?

A. I did not. [495]

(Testimony of Arthur O. Bodine.)

Q. Now, Mr. Hazelton testified the other day about the 1st of May, 1937, you had a conversation with him. Do you recall that conversation?

A. I recall his testimony as being about the 1st of May, but I didn't have the conversation with him the 1st of May.

Q. When was the conversation?

A. The conversation was at least a month prior to that time.

Q. Probably about the 1st of April?

A. On or about the 1st of April.

Q. Do you recall what caused you to speak to Mr. Hazelton at that time? Was there anything that happened on or about that time that brought the matter to your mind?

A. Yes. I was down in the yard one day. It just occurred to me, probably had been thinking about it, and that was to the effect that there were union activities that had been—I had heard about in some of the other clay plants, and I said [496] that to Lester, I said, "There probably will be some union organizers come out here some day." It was my supposition, if they were active in the other plants, they would be out there.

Q. That is natural.

A. I said to Lester, I said, "If they do," I said, "You find out what they have to offer," I said, "And then you use your own judgment as to what to do."

(Testimony of Arthur O. Bodine.)

Q. And did you say anything respecting the company bonus at that time? A. No, sir.

Q. Didn't say a word about it?

A. No, sir.

Q. But you had talked with him about the union, had you not?

A. As I stated, yes. [497]

Q. (By Mr. Mauritsen) Mr. Bodine, some of these, a number of men have testified, a number of the men that were laid off, that they have received letters of recommendation from you. Did you give a number of these men letters of recommendation? A. Yes, sir.

Q. And you would not give a man a letter of recommendation unless his work had been satisfactory, would you?

A. I wouldn't do that. I wouldn't give him any letter unless he was worthy of it in my opinion.

Cross Examination

Q. (By Mr.Howlett) Referring to Exhibit B-2, you have read it? Did you gain the impression from that letter there would be a strike called on June 11? A. I did not.

Q. Did anyone tell you there would be a strike called on June 11? [498] A. No, sir.

Q. Now, you attended the meeting of June 1, 1937, correct?

A. Yes, sir, the union meeting.

Q. Yes. A. The organizers' meeting.

(Testimony of Arthur O. Bodine.)

Q. Did Mr. Larson or anybody else instruct you to go? A. No, sir.

Q. Did they ask you to go? A. No, sir.

Q. Did they know you were there at that time? At the time you were at the meeting, did anyone know you were there, Mr. Larson know you were there? A. No, sir.

Q. Did you go with anyone else?

A. I went with Mr. Anderson.

Q. What are the circumstances leading up to your going?

A. Why, I just made the remark to him that I was going to go down to the hall that night and asked him if he wanted to go along; if he did, I would stop and pick him up. He said yes, that he would like to go down. He lives right along my [499] way going into town, so I stopped.

Q. Did you know of any reason why you should not have been at that meeting?

A. Why I shouldn't have been?

Q. Yes. A. No, I do not.

Q. Did you make a list of any of the men that were there? A. I did not.

Q. Did you go there for the purpose of finding out who were there? A. No, sir.

Q. Did you have any different feeling toward the men after the meeting than you did before you went there? A. No, sir.

Q. Whom did you sit with when you were there?

A. Mr. Anderson.

Q. The man you took with you?

(Testimony of Arthur O. Bodine.)

A. Yes.

Q. Did he leave when you left?

A. Yes, sir.

Q. You left before the meeting was over?

A. I left as soon as the speaker was finished with his address, when he invited the attendance to come up and get what information they wanted. He put it in words something to this effect: "Any of you fellows want information, want to make [500] application," he says, "Come up."

Q. That is when you left?

A. That is when I left, when the fellows started to go up. That is when I left.

Q. Did you leave the hall?

A. I left the hall.

Q. Did you see anybody sign at that time?

A. I did not.

Q. If you had seen anybody sign, would it have made any difference to you as far as your opinion of the man or the organization he signed up with are concerned? A. Would not.

Q. Did you ever, at any time, tell any of these men they couldn't join the union?

A. No, sir.

Q. Did you ever discharge any man for being a member of the union?

A. No, sir.

Q. Well, did you ever know whether anybody was a member of the union? A. No, sir.

Q. Do you know now?

A. Only by the exhibit on the table there.

Q. Was that the first time you ever say the list?

(Testimony of Arthur O. Bodine.)

A. That is the first time. [501]

Q. That was in the court room some time during this proceeding?

A. It is the first time. [502]

Q. Mr. Bodine, I show you Board's Exhibit 2. You have testified that you received that on June 10 at seven-thirty o'clock in the morning, 1937, didn't you? A. Pardon me, but—

Q. (Interrupting) Didn't you testify that you received that on that date? A. Yes, sir.

Q. Whose names are attached to that?

A. Edward G. Hannum and Lawrence McNutt.

Q. You knew they were members of the union, didn't you?

A. After I received this.

Q. Who delivered the petition to you?

A. Mr. Lucas.

Q. Was there anybody with Mr. Lucas?

A. Louie Juarez and Mark Damron.

Q. Was Glen Stewart also on the committee?

A. I don't recall whether Glen Stewart was or not.

Q. At least you knew that those—

A. (Interrupting) Mr. Lucas came into my office with it and Mr. Damron and Juarez came to the entrance of the door, so I didn't notice.

Q. Then yon knew they were members of the union, didn't you? [505]

A. Well, I never thought of it in that way. That probably would indicate they were members of the union. [506]

(Testimony of Arthur O. Bodine.)

Recross Examination [512]

Q. (By Mr. Gately) Well, these men that was laid off on June 2 or 3, when the lay-off came, their services were just terminated, their employment was terminated?

A. Temporarily, as far as—

Q. (Interrupting) You paid them off in full, gave them their Social Securities notices, and so forth? A. Oh, yes.

Recross Examination

Q. (By Mr. Howlett) You had no way of knowing at that time, [514] or did you have any way of knowing at that time, how long these men would be away from work?

A. I had no way of knowing.

Q. So that you couldn't have told them to come back in three days, or five days, or 15 days?

A. No.

Q. Is that correct? A. I could not.

Q. What determined whether they should come back or not?

A. The question hinged on business conditions. [515]

JOHN ELLIS MILLS.

a witness called for and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

(Testimony of John Ellis Mills.)

Trial Examiner Stephenson: State your full name, please.

The Witness: John Ellis Mills.

Direct Examination

Q. (By Mr. Mauritsen) Mr. Mills, are you employed by the [517] Los Angeles Brick & Clay Company? A. I am.

Q. How long have you been employed by the company?

A. Continuously since August 1, 1927—no, 1929.

Q. Were you subpoenaed to appear at this hearing, were you? A. I was.

Q. In what capacity are you now engaged with the respondent?

A. I have full charge of the bringing of the clay down to the plant, all stripping operations, and everything pertaining to the clay pits.

Q. How long have you held that position?

A. During the full length of my employment there.

Q. Started in in 1929?

A. Came on the job to take over that job.

Q. Would it be proper to designate your position as the pit foreman?

A. Pit foreman would be correct.

Q. Mr. Mills, did you attend the meeting of the union held on June 1, 1937, at the American Legion Hall in Elsinore? A. I did.

Q. Have you received an invitation to attend that meeting?

(Testimony of John Ellis Mills.)

A. Well, I never received any personal invitation, but my attention was drawn to it by noticing hundreds of handbills which were scattered around the plant. On noticing that the meeting was to be held there, I decided that, as Police Com- [518] missioner of the City of Elsinore, I was entitled to be there and should be there. [519]

A. Well, I could not state as to who were present or who were not present. The hall was pretty well crowded with men, that is, practically all of the available seats were taken and it was necessary for me to go up almost to the speaker's end of the room in order to find a vacant chair. The meeting was just about ready to get under way before I went in there.

Q. About how many people would you say were in attendance at that meeting?

A. Well, I made no attempt to count them, but judging in my mind as to the capacity of the room, I would say that there were probably 50 men or possibly 60, somewhere in that neighborhood. I may be wrong 10 or 15 men one way or the other. I am satisfied there were over 40 men there anyway.

Q. Did you see Mr. Bodine at that meeting?

A. Well, I can't say that I did see him. No, I couldn't swear that I saw Mr. Bodine.

Q. Did you see Mr. Gantz?

A. Yes, I saw Mr. Gantz.

Q. Did you see Mr. Baer?

(Testimony of John Ellis Mills.)

A. I saw Mr. Baer come into the meeting when it was just about over, just about at its conclusion. [520]

Q. You were there after the meeting—when the organizer called for the signing of application cards?

A. When he called for the signing of application cards, there were two men started to walk up and I immediately left the room and went outside and was approximately 300 feet away from the building until the meeting was entirely disbanded. In other words, I went up on to the main street. This building happens to be on the corner of Spring Street. Our main street is one block up. I went up to the corner. I believe I did walk up to the City Hall and then came back again, not to the meeting, but to the corner. [521]

Q. Mr. Mills, did you ever talk with men, or with any of the men, about joining the union?

A. Yes. The men on various occasions approached me and wanted to know what to do about it. I simply told them, "Well, boys, it is up to you. You know just as much about it as I do, and as near as I can see it is strictly up to you. The company has nothing to do with it. I certainly haven't got anything to do with it."

Q. Mr. Mills, since the calling off of the strike, have you engaged any men to work in the pit?

(Testimony of John Ellis Mills.)

A. I have.

Q. Have you engaged any new employees?

A. Yes.

Q. Employees who had not worked for the company before? A. Yes.

Q. At the time when you engaged these—no, withdraw that.

Approximately how many new employees have you hired?

A. Well, I have got one new truck driver, and oh—I don't know. I would say possibly four or five new men.

Q. But you couldn't be sure of it?

A. I couldn't be sure of it without checking the records.

Q. Were any of the men who went out on strike in your crew?

A. Yes. All—practically, I would say, though I am not sure as to one man, but all the rest of the Americans, or white boys, came to me and told me that they had signed up [527] with the union. I believe that there were very few of my Mexican laborers who signed up, but the American boys did sign up, according to what they told me, with the exception of one man. He told me he never did sign. [528]

Q. Did you see any of your men on the picket line? A. Yes, I did.

Q. Now, at the time when you put these entirely new men to work, were any of the men who had

(Testimony of John Ellis Mills.)
worked for you and gone out on strike, were they still not employed by the company?

A. Yes—no, they were still not employed by the company.

Q. In other words, at the time that you employed entirely new men there were still some experienced men who were not working?

A. They were not working for the company. [529]

Q. They were not working for you?

A. They were not working for me.

Q. And you knew it?

A. I knew they weren't working for me, but I did not know but what they were working some place else.

Q. In fact, you didn't know anything about whether they were working or not, did you?

A. No, I did not. When I wanted a man, it usually happens, when I want a man I want him. If there is a man available there we hire him, that is, I hire them for the pit.

Q. In what relation do you stand to Mr. Bodine, in the plant?

A. Mr. Bodine is my superior.

Q. In regard to hiring and firing men, you have absolute discretion in the pit?

A. Absolutely so; never been any question on that point.

(Testimony of John Ellis Mills.)

Q. Has it been your experience, Mr. Mills, that all things being equal, men who have had experience are better qualified to do that particular type of work?

A. Why yes, all things being equal, certainly so. [530]

Q. (By Mr. Mauritsen) Perhaps I misunderstood you, Mr. Mills. You say experienced men could do the work better than inexperienced men, all things being equal.

A. That is what I said and I stand by that statement, all things being equal the experienced man is the better man.

Q. Well, what do you mean——

A. (Interrupting) In this particular case, in one case in particular, the experienced man was not equal to the man who had the job before him, nor is equal to the man filling the job at the present time.

Q. Is that in one instance?

A. One instance, and that happens to be the only instance of any man who is not working there who re-applied for work—I withdraw that.

He happens to be the only man who is not working there today through any fault of myself. In other words, all the rest of the men who had applied were reinstated.

Q. Now, may I—do I understand there has been a lay-off at the plant since the man went on strike, that is, on or about November 1?

(Testimony of John Ellis Mills.)

A. Sometime ago we retrenched, business was slack and we [531] did lay off a few men. I do not recall how many I laid off, probably three or four.

Q. That is enough.

Now, did I understand you to say that there is only one man who is not now working in the pits, who was working on June 1, as a result of action on your part?

The Witness: If I may answer it in this way, that there are men not working at the plant, or in the pits, who were working previous to the strike, but the reason they are not there today is because, at the time of the strike, or previous to the strike, when they were laid off, they left for parts unknown and as far as I know there is only one man who applied for reinstatement who was not taken back on the payroll. [532]

Cross Examination

Q. Now, since June 11, 1937, you stated that you had hired four or five new men in the pit?

A. That is correct.

Q. Do you have those records with you showing the men's names? A. The new men?

Q. Yes. A. No, I haven't. [533]

Q. What is the name of the man that came back, that applied for work and came back, that you didn't take?

A. James Grier, known as Jimmie Grier to us.

(Testimony of John Ellis Mills.)

Q. Why didn't you take him back?

A. He was inefficient.

Q. In what respect?

A. With the equipment. I moved him from one position to another until finally he was down to the water wagon, which we consider the weakest job of the bunch, and he couldn't fill [535] that bill.

Q. What other positions had he held?

A. When he came under my jurisdiction, or previous to coming under my jurisdiction, he was working down in the yard. I needed a truck driver one morning, and the yard foreman said, "Well, I have got a man out there. I wish you would give him a chance. He has been working down here and I would like you to take him up there, if you can use him."

"All right, anything to accommodate you, Harry." That was Harry Conger. So I took him up there and he said he was a truck driver. It didn't take me very long to find out he wasn't a truck driver. He had more trouble with the rig than any man that drove it before ever had. So, at the earliest opportunity I made a transfer.

I put him on a Plymouth locomotive that runs on the track. All that is necessary to do is to go back and forth on the track. Well, it was the same story. He run through switches, threw the cars off the tracks, and when the man who previously ran the locomotive came back and asked for a job again, I

(Testimony of John Ellis Mills.)

was only too glad to take Grier off and put him on the water wagon.

You understand the water wagon is what we use for wetting down our roads, and we used to haul water up into the places for the use of the men. Well, he was in the shop more than he was on the road, and always something was wrong, something [536] wrong here, something wrong there. He turned out to be such a pest around the shop that the shop foreman was continually sore about him being in there and I wasn't getting the service that I thought I should have from the outfit, so when the instructions came along that we lay men off, of course, naturally, even had he been the best man I had, we would have stopped the water wagon anyway, we always do, and he would have been one—if he had been one of the best men I had, he would have been transferred on one of the other rigs, but being incompetent, considered incompetent by myself, naturally I let him go.

Q. Were you instructed by anyone to let Mr. Grier go? A. No, I was not.

Q. Who determined that he should go?

A. I was the sole determinator of that factor.

Q. You stated about this time you stopped the water wagon. Will you explain that statement, please?

A. Well, it isn't absolutely essential that we wet the roads down. If we are not running the trucks

(Testimony of John Ellis Mills.)

up and down the road frequently, we get by without wetting them down. In other words, the roads do not cut up so much, and I would put a man on, run it for a day or two and then stop it temporarily —and then lay it up again for a period of time.

Q. Do you have anyone on that water wagon now?

A. No. That water wagon has been laid up for the past two [537] or three weeks. [538]

Q. If a man did unsatisfactory work for you, Mr. Mills, would you give that man a letter of recommendation?

A. I have never failed—yes, I would, and I have.

Q. That is enough. Your counsel can ask you any other questions.

You would give a man a letter of recommendation? A. Yes.

Q. (By Mr. Mauritsen) If a man's work wasn't satisfactory, you would still give him a letter of recommendation?

A. I would make no attempt whatsoever of depriving another man from earning a livelihood.

Q. Mr. Mills, I show you a letter. Is that your signature? A. (Examining document) Yes.

Q. Are you J. E. Mills?

A. That is my name. [539]

Mr. Mauritsen: I should like to introduce this into the record at this time.

(Testimony of John Ellis Mills.)

(The document referred to was passed to Mr. Howlett.)

Trial Examiner Stephenson: At this time counsel for the Board is offering in evidence a letter dated June 18, 1937, addressed to whom it may concern, and signed by J. E. Mills, Mine Superintendent. The same will be received in evidence and marked as Board's Exhibit 8.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 8.)

BOARD'S EXHIBIT No. 8

Elsinor, Calif.
June 18th, 1937

To whom it may concern:

The Bearer J. D. Grier has been employed by the Los Angeles Brick & Clay Products Co. the past three years as truck driver under my supervision and I have at all times found him a reliable man. Due to lack of business it has become necessary to cut our force.

Yours

J. E. MILLS

Mine Supt.

[Endorsed]: 1/10/38. Board's Exhibit No. 8.

Q. (By Mr. Mauritsen) Now, Mr. Mills, you gave this letter to Mr. Grier after he had been laid off at the plant, did you not?

A. Oh, yes.

(Testimony of John Ellis Mills.)

Q. And you addressed it to the world, as it were, to anyone? A. Yes. [540]

Recross Examination

Q. (By Mr. Howlett) About this letter now, Mr. Mills, what did you wish to say about it in explanation to the last question?

A. I believe that Mr. Grier tried to do the best he could. If I had not thought so he would have been discharged possibly a year before the time that he was, but I believe he was making an effort to do what he thought was right, and consequently it was with regret that I had to discharge him and I wanted to make it just as easy as possible for him to secure employment in some other line. I was satisfied that he would not attempt to get on that kind of equipment again, probably get into some other line. [541]

HARRY P. GANTZ

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: Harry P. Gantz. [545]

Trial Examiner Stephenson: How do you spell the last name?

The Witness: G-a-n-t-z.

(Testimony of Harry P. Gantz.)

Direct Examination

Q. (By Mr. Mauritsen) Mr. Gantz, you were subpoenaed to appear at this meeting, were you not? A. I was.

Q. Have you ever been employed by the respondent company? A. Yes, sir.

Q. Are you now employed by the respondent company? A. Yes, sir.

Q. In what capacity are you employed?

A. Yard foreman.

Q. How long have you held the position of yard foreman, Mr. Gantz?

A. January 1, 1937.

Q. And what position did you occupy prior to that time?

A. I first came to the plant in 1937, January 1.

Q. So that you have been with respondent——

A. (Interrupting) One year.

Q. Approximately one year?

Mr. Howlett: Speak up a little louder. It is difficult for us to hear on this side.

Q. (By Mr. Mauritsen) In what relation do you stand to Mr. Bodine? [546]

A. Well, Mr. Bodine is my superior. He is my boss.

Q. Do you have jurisdiction over all the plant that Mr. Mills does not have jurisdiction over?

A. No, sir.

Q. Are there any other foremen of respondent who occupy approximately the same position that you do in the yard? A. No, sir.

(Testimony of Harry P. Gantz.)

Trial Examiner Stephenson: I don't believe the witness understood what you mean. You mean are there other foremen in the plant besides himself and Mr. Mills? Is that what you meant?

Mr. Mauritsen: No. I mean, what I was trying to find out is, just what the situation is. In other words, Mr. Mills has charge of the pits and Mr. Gantz says he is in the yard and I want to know if he has jurisdiction over the whole yard or if there are other foremen under Mr. Bodine who occupy approximately the same position?

The Witness: I am the only man in the yard, supervising shipping, drawing and setting, placement of tiles and brick and sewer pipe.

Q. (By Mr. Mauritsen) Do you know what other activities are undertaken in the plant other than drawing of tile and these things you have referred to?

A. Well, setting of the tunnel kiln, that is classed as the yard, and construction in the yard. [547]

Q. Who has charge of those two?

A. Mr. Baer.

Q. Now, are there any other functions carried on in the yard over which you do not have supervision?

A. Outside of what I just mentioned—not outside of what I just mentioned.

Q. Do you have the authority to hire and fire men?

(Testimony of Harry P. Gantz.)

A. I haven't authority to hire, but I have authority to fire.

Q. For flagrant violations of rules, or misconduct, you have the authority? A. Yes, sir.

Q. But you have no authority to hire men?

A. No, sir.

Q. Did you attend the union meeting held in the American Legion Hall in Elsinore on June 1. 1937? A. Yes, sir.

Q. Were you invited to attend that meeting?

A. Had no personal invitation, outside of the pamphlets they threw around.

Q. Have you ever had any experience with unions in your work, Mr. Gantz?

A. No, sir. [548]

Q. (By Mr. Mauritsen) Now, do you recall any of the men whom you saw at that meeting?

A. Yes. I seen Mr. Bodine, Mr. Anderson, Mr. Baer and I seen McNutt. [549]

Q. On the day following this union meeting on June 1, did you have a conversation with Mr. Ashworth regarding the union?

A. Partly, yes.

Q. Did this conversation take place at noon?

A. Yes, sir.

Q. And what did you say to Mr. Ashworth at that time regarding the union? [551]

A. All I said with regard to the union was—he asked me a question first and I answered him.

(Testimony of Harry P. Gantz.)

Q. What did he ask you?

A. He asked me what I thought about the union, and I said, all I said about the union, I said "if the union was anything like the talk the speaker made, I don't think very much of it."

Q. Then did you say anything further?

A. No, I don't remember anything else.

Q. That ended the conversation, as far as you recall?

A. Yes. There was another fellow there, Lyle was in the car.

Q. Did he stay in there during the entire course of the conversation?

A. Well, he was there, yes.

Q. All the time? A. Yes, sir.

Q. Did you ever talk with any of the other men with regard to the union?

A. Yes. I talked to McNutt once about it.

Q. Do you recall on what occasion you talked to McNutt about the union?

A. I was around the kiln, either near the kiln or around the kiln some place? [552]

Q. What did you say to McNutt at the time?

A. He asked me the same thing, and I answered the same way.

Q. The same way? A. Yes.

Q. That you didn't think much of the union if it corresponded——

A. (Interrupting) Judging from the way the speaker spoke, if the union was anything like that, I didn't think very much of it. [553]

(Testimony of Harry P. Gantz.)

Trial Examiner Stephenson: One question, Mr. Gantz.

At this meeting at the Legion Hall, did you notice any of the employees who worked under you at that meeting? [554]

The Witness: McNutt.

Trial Examiner Stephenson: Anyone else?

The Witness: No, sir.

Trial Examiner Stephenson: McNutt was the only employee?

The Witness: That I remember.

Trial Examiner Stephenson: That worked under your immediate supervision that you noticed at the meeting?

The Witness: Yes, sir.

Cross Examination

Q. (By Mr. Howlett) How have you been going to and from work? [555]

A. Driving a machine.

Q. During the past year or so?

A. Driving a machine.

Q. Whose machine do you drive?

A. Well, right at the present time I am driving mine, and Johnnie Mills is driving his.

Q. What did you do prior to the strike?

A. I drove mine and Billy Ashworth drove his.

Q. Did you ride in separate cars, usually?

A. No, sir. We rode in the same car.

(Testimony of Harry P. Gantz.)

Q. Who else rode in the same car with you?

A. Jack Osborn and Lyle.

Q. Who drove the car?

A. Whose ever turn it was to drive drove the car.

Q. You took turns in driving?

A. Took turns for a week, each week.

Q. Where did you pick each other up?

A. Right at the home, right at their homes, go right to their homes.

Q. That rotating around until it was time for the other man to use his car? A. Yes, sir.

Q. And how long did it take you to drive from the various homes to the plant? [556]

The Witness: I would say about—around 20 minutes, a little better.

Q. (By Mr. Howlett) Did you go home for lunch? A. No, sir.

Q. And that association continued for how long?

A. Still continues, as far as I am concerned.

Q. And during those trips did you discuss various matters of business and pleasure? A. Yes.

Q. So that when you met you discussed whatever happened to be on your mind, freely?

A. Yes, sir. [557]

Q. (By Mr. Howlett) Now, you testified that on June 2 you talked with Mr. Ashworth about the plant and he asked you a question?

A. Yes, sir.

(Testimony of Harry P. Gantz.)

Q. And what was that question he asked you?

A. He asked me what I thought about the union.

Q. Did you answer that question?

A. Yes, sir.

Q. Did anyone above you in superiority advise you what to say on any of those occasions when questions like that were asked? A. No, sir.

Q. Did Mr. Bodine ever instruct you to make any statement to these men concerning your opinion or the company's opinion concerning union activities? A. No, sir.

Q. Now, on—withdraw that.

After June 1, at some time, you testified that you had a conversation with Mr. McNutt?

A. Yes, sir.

Q. What was that conversation?

A. He asked me what I thought about the union.

Q. Did Mr. Bodine or Mr. Larson or anybody superior to you instruct you prior to that time as to what you should say if [558] there was a question as to union activities? A. No, sir.

Q. Has anyone since that time instructed you to say anything? A. No, sir.

Q. How long have you known Mr. McNutt?

A. Only since the time he was employed out at the plant.

Q. How frequently did you see him?

A. Every day.

Q. How many times a day?

(Testimony of Harry P. Gantz.)

A. Oh, it is hard to answer.

Q. A few times?

A. I was in the kilns off and on all day.

Q. You were in close association?

A. Yes, sir.

Q. Did you have instructions from anyone relative to your attending or not attending the meeting of June 1? A. No, sir.

Q. Where do you live?

A. You mean in distance from the hall?

Q. Yes.

A. About three blocks, three and a half blocks.

Q. At what time did you leave that meeting?

A. I left after Mr. Green got through addressing the boys.

Q. Did you make a statement during the course of that meet- [559] ing to anyone? A. No, sir.

Q. I am referring now to other than the man who sat next to you? A. No, sir.

Q. Did you, after that meeting, give any instructions to any of your men as to your ideas of joining or not joining a union? A. No, sir. [560]

Cross Examination

Q. It has been testified here by Mr. McNutt that you advised him not to join the C. I. O. but to form a local union of their own. Do you remember that? A. I do not.

Q. Do you remember such a statement as that?

(Testimony of Harry P. Gantz.)

A. No, sir.

Q. What was the purpose of you attending this meeting? Did you intend to join the union?

A. Well, I don't know; if I could benefit myself in any way maybe I would have. [562]

ARTHUR O. BODINE

called as a witness by and on behalf of the Respondent, having been previously duly sworn, was examined and further testified as follows:

Direct Examination

Q. (By Mr. Howlett) Mr. Bodine, I will show you four sheets of yellow paper and ask you what that is.

A. These papers, with names attached, represent the men who were passed through the channels of our payroll account from June 1, 1937, to July 31, 1937.

Q. Who were those prepared by?

A. They were prepared by Mr. Anderson, our plant office man.

Q. Is he under your supervision?

A. Yes, sir.

Q. And these are taken from the permanent record of your company?

(Testimony of Arthur O. Bodine.)

A. Taken from the permanent records—that is, the permanent records are established from the same source as this.

Q. Do these papers purport to show the number of men, the names of the men, when first hired, when laid off, when they struck, when they were rehired, if rehired and also whether the names are shown on the short card or on the long card, Exhibit B-5, and also shows the month of June, 1937, and the month of July, 1937, and the dates of each month and shows, [572] by "X's" placed on the record, that the men worked on the days indicated?

A. That is right.

Trial Examiner Stephenson: And the cards referred as Exhibit B-5, the "SC" refers to the short cards and "LC" to the large cards?

Mr. Stuart: The small cards, yes.

Mr. Howlett: At this time I wish to introduce this in evidence.

Trial Examiner Stephenson: As Respondent's Exhibit 1. Any objection, Mr. Mauritsen or Mr. Gately?

Mr. Mauritsen: No.

Trial Examiner Stephenson: It will be received in evidence and marked as Respondent's Exhibit 1.

(Thereupon the documents above referred to were received in evidence and marked as Respondent's Exhibit No. 1.)

Exhibit B-5

June 1937 — July 1937

No.	Names	First Hired	Laid Off	Strike	Rehired	S.C.	L.C.	Remarks
1	Martenson, Nils	June 1926		June 11-37	July 7-1937	6/14		
2	Polanco, Lawrence	July 1-1937	—	—	—			
3	Kelley, Francis	Aug 21-1936	June 8-1937	—	—	6/1		
4	German, Frank	" 21-1936	—	June 11-37	—	6/1		
5	Renetti, S.	June - 1925	—	—		6/12		Was not working at time of strike asked for leave of absence was granted.
6	Stewart, C Glenn	Dec. 11-1934	—	June 11-37	—	6/4		
7	Torres, Mike	July 4-1934	—	" 11-37	June 24-37		6/1	
8	Rios, Jasento	Jan. 1933	—	" 11-37	" 24-37		6/5	
9	Hannum, Edward	July 1935	June 7-1937		—		6/1	
9	Melendez, Julian	July 1-1937						
10	Fierro, S S	Mar 3-1936		" 11-37	June 28-37		6/7	
11	Castillo, Felix	Feb. 6-1935		" 11-37	" 28-37		6/5	
12	Hansen, Claude	Jan 4-1937	June 3-1937	~~June~~	July 21-37		6/4	
14	Chamberlain, John H	Feb 1-1934	—	—	—			On State Compensation
15	Martinez, William	July 1-1937						
16	Valenzuela, Mike	Oct 1927		June 11-37	June 23-37		6/4	
17	Renetti, Angelo	Sept. 1927		" 11-37	" 28-37	6/12		Asked for leave of absence
18	Grier, James	Jan. 1934	June 9-37			6/5		
19	Martinez, Romulo	Feb 1925		" 11-37	Jun. 16-37			
20	George, G.B	Jan. 1934	June 9-37		July 6-37		6/1	
21	Alonzo, A	May 1925		June 11-37	June 21-37			
22	Acosta, Jose	Mar. 1934		" 11-37	" 16-37			
23	Puga, Jesus	Apr 21-1936		June 11-37	June 24-37		6/3	
24	Espinoza, A	Apr 20-1929		" 11-37	" 28-37			
25	Smith, Harold	Jan 12-1934	—	—	—			
26	Johnson, John.	Aug 16-1935		" 11-37	June 28-37	6/7		
27	Hazleton, Lester	Dec 28-1929	June 3-1937			6/1		
28	Bernard, Peter	June 4 1925		" 11-37	Jun. 23-37		6/11	
29	Fuller, O L.	Sept 14-1936		" 11-37	July 19-37		6/5	
30	Ashworth, Wm G	Oct. 8-1935	June 8-1937			6/1		
31	Neblett, Bob	Nov 5. 1934	—	—	—			
32	Limon, Antonio	Nov. 1935		June 11-37	July 12-37		6/5	
33	O'Dell, George	Dec. 1-1936	June 9-37		Jun. 30-37		6/5	
34	Perez, F	Nov. 1934		June 11-37	Jun 25-37		6/5	
35	Sternberg, Benito	Apr 1925		" 11-37	" 22-37			
36	Arzate, Jose	Sept. 1935		" 11-37	" 28-37		6/6	
37	Joiner, Jack	Nov. 12-1934		" 11-37	" 22-37			
38	Mendoza, Raymond	May 1927		" 11-37	" 25-37		6/5	
39	Martinez, Emeliano	July 1-1937						
40	Rios, Jesus	Jan 1934		June 11-37	Jun. 24-37		6/4	
41	Foley, Mike	Mar 1930		" 11-37	" 25-37		6/6	
42	Ruelas, Joe	Sept. 22-1936		" 11-37	" 29-37		6/1	
43	Bailey, A	" 1925		" 11-37	" 22-37			
45	Perez, Pascual	Feb 1933	Jun 3-37		" 28-37	6/1		
46	Chamberlain, H G	Mar 1931		Jun. 11-37	" 30-37		6/8	
47	Gallatin, O.S.	July 1 1935		" 11-37	" 22-37		6/7	

111 Union } = Totals for men
61 Non-Union } represented on these sheets.

National Labor Relations Board
Case XXI-C-297
Exhibit No. 1
L. A. Brick & Clay Products Co.
Date 1/10/38
E. L. Conklin

Exhibit B5

June 1937 — July 1937

No.	Names	First Hired	Laid off	Strike	Rehired	SC.	L.C
48	Esparza, T	Oct 1935		Jun 11.1937	Jun 24-37		6/6
49	Rios, F	Nov 9.1931		" 11- "	" 24-37		6/5
50	Joiner, C E	Jun 28.1937					
51	Castillo, A	June 1927		Jun 11-1937	Jun.28-37		6/4
52	Haddick, Chas	July 7-1927		" 11-37	"		
53	Delgadillo, Joe	Feb 1934		" 11-37	" 16-37		
54	Norris, Kenneth	Sept 29-1936	Jun 9.37		Jul. 15-37	6/1	
55	Rodriquez, Doroteo	Feb 1934	" 2-37		Jun 18-37		
56	Joiner, J.W	July 6-1927		Jun. 11-37	" 22-37		
57	Guerra, A	Aug 1929		" 11-37	" 28-37	6/5	
58	Rodriquez, Ramon	Jun 1925		" 11-37	" 24-37		6/5
59	Ayres, David	Dec 16.1935		" 11-37	" 16-37		
60	Urquiza, E.	Feb 1935		" 11-37	" 16-37		
61	Martinez, Emilo	Dec 1-1936		" 11-37	" 16-37		
62	Martinez, P.	Feb 1935		" 11-37	Jun.23-37		6/4
63	Ayala, Mariano	Nov 28.1935		" 11-37	" 16-37		
64	Sullivan, John	Oct 8.1936		" 11-37	Jun 24-37		6/12
65	Ayala, Fortino	Sept 1935		" 11-37	" 24-37		6/5
66	Cathey, D	Aug 3-1936		" 11-37	" 24-37		6/12
67	Harmon, W.T.	Dec 9-1936		" 11-37	—		6/12
68	Hostettler, A G.	Jun 8-1928		" 11-37	Jun 28-37		
69	Anaya, C F	" 1928		" 11-37	" 28-37		6/4
70	Arguelles, M.	July 1928		" 11-37	" 18-37		
71	Starr, C.W	Apr 1935	Jun 3-1937		—	6/4	
72	Bernard, Pete Jr.	Jun. 1926		Jun 11-37	Jun. 28-37		6/1
73	Polanco, P	" 1928	Jun 8.1937		" 22-37	6/6	
74	Marino, Manuel	July 1-1937	—	—	—		
75	Romero, D	Apr 1930	Jun. 2-1937		—		
75	Juarez, Jose	July 15.1937	—	—	—		
76	Oyas, Alfred	Sept 2-1936	Jun 3-1937		Jul 12-37		6/5
77	Torbett, Carl	" 2.1936	—	—	—		
78	Mayer, Bert	July 1935		Jun 11-37	July 15-37		6/6
79	Lucas, C.W	" 1935		" 11-37	—	6/4	
80	Osborn, T	Nov 6-1936	—	—	—		
81	Polanco, Alec	Jan 1936	Jun 8.1937		Jun 25-37		6/5
82	Miller, L.C.	Aug 24-1936		Jun 11-37	" 24-37	6/12	
83	Olufson, O J	Nov 2-1935	Jun. 3-1937		Jul. 20-37		
84	Olufson, Gene	" 2-1935	" 9-1937	—	—	6/4	
85	Gomez, Jose	May 1-1927		Jun 11-37	Jun 25-37		6/4
86	Williams, E.	Nov.25-1936		" 11-37	" 17-37		
87	Taylor, J.S.	Oct. 1935	Jun 9-37	—	—		
87	Sepulveda, Manuel	July 21-1937	—	—	—		
88	Romero, J G	Apr 2-1936		Jun 11-37	Quit		6/5
89	Maldonado, F	Mar. 7-1928		" 11-37	Jun 28-37		6/5
90	Corrales, Manuel	Oct. 5-1936	—	—	—		
91	Rios, Simon	Jun 1927		Jun 11-37	Jun 28-37		6/4

— Sick —

— Monthly —

Exhibit [illegible]

June 1937 — July 1937

No.	Names	First Hired	Laid Off	Strike	Rehired	SC	LC
92	Acosta, Joe Jr	Dec 1935		Jun 11-37	Jun 24-37		6/4
93	Pearl, Claude	Sept 30-1936	Jun 8-37			6/1	
93	Baer, F. S.	Jul. 25-1937	—	—	—		
94	Ortega, Paul	Nov 1927		Jun. 11-37	Jun 28-37	6/5	
95	Aguilar Joe	Dec 11-1925		11-37	Jul 2-37		6/4
96	Moss, A.	Apr 14-1937	Jun 3-37		—		6/5
97	Ramirez, Henry	Mar 31-1936		Jun 11-37	Jun 24-37		6/5
98	Villa Chon.	Dec 17-1936		" 11-37	" 28-37		6/1
99	Wenker, Gerald	Jul 1-1936	Jun 3-37				6/1
100	Damron, M.C.	Mar 4-1937		Jun 11-37	Jun 30-37	6/1	
101	Dabich, Sam	Jan 1926		" 11-37	Jul. 7-37	6/4	
102	Fuller Chester	May 19-1937		Jun 11-37	—		
103	Osborne, S	Sept 8. 1936		" 11-37	—		6/1
104	Lopez, Wm	Jun 22-1936		" 11-37	Jun 16-37		
105	Dominguez Jose	" 1927		" 11-37	Jun 24-37		6/9
106	Eaglin M J	Feb 2-1937		" 11-37	—	6/4	
107	Burrola, F.	Jun 1927		" 11-37	Jun 24-37		6/5
108	Michaels, Lee	Dec 1935		" 11-37	" 24-37		6/8
109	Peterson, John	Oct 27-1927		" 11-37	" 28-37	6/1	
110	Arsiga, Jose	Jun 1927		" 11-37	" 29-37		6/5
111	Solis, E	May 6-1926	Jun 8-1937		July 7-37	6/4	
112	Hannum, A	Feb 5 1937		Jun 11-37	—		6/5
112	Vega, Rafael	Jul 21-1937	—	—	—		
113	Lyell, Cornell	Dec 1935	—	—	—		6/1
114	Kemad, Risto	Mar 25-1929		Jun 11-37	Jun 21-37		
115	Traver E C	Dec 26-1925		" 11-37	" 16-37		
116	Garcia, Lupe	Jan 18. 36	—	—			6/2
117	Reyes, J L.	Nov 6. 36		Jun 11-37	Jun 28-37		6/5
118	Davies, Albert	" 16-36	Jun 3-1937				6/6
118	Arguello, Y	Jul 19. 37	—	—	—		
119	Alva, Ray	" 19-37	—	—	—		
120	Lopez, Joe	Mar 5. 36	Jun 2-1937				6/1
120	Alcaraz, D	Jul 22-37	—	—	—		
121	Perez, Alejo	Mar 5-36		Jun 11-37	Jun 23-37		6/7
122	Osbian, J F	" 7-36		" 11-37	" 18-37		6/1
123	Villa, N	" 9-36	Jun 2-1937				6/8
124	Bland, Chas	" 27-36		" 11-37	—		6/5
125	Mayer, Stanley	Apr 14-28		" 11-37	Jun 29-37		6/5
126	Tharp, L E	" 6-36		" 11-37	—		6/5
127	McGonigal, H.	" 16-36	Jun 2-37		Jun 21-37		6/6
128	Freeman, K.	" 11-37		Jun. 11-37	Aug 10. 37		6/8
129	Oyas, George	Feb 4-37		" 11-37	Jun 29-37		6/6
131	Jiminez, P	May 19-36		11-37	" 28-37		6/1
132	Luna, Y	" 18-36		11-37	" 28-37		6/1
133	Juarez, Luis	" 28 36		11-37	" 28 37		6/1
134	Duarte, Julio	Jun. 1-36		" 11-37	" 21-37		

Exhibit R 5

June — July

Company No	Names	First Hired	Laid Off	Strike	Rehired	SC	LC
135	Dyas, C	Jul 1928		Jun 11-37	Jun 22-37		6/6
136	Bointjer, H A	Apr 6-37	Jun 1-37		—	6/5	
137	Hall, John	May 24 37	—	—	—		
138	Williard Chas	Jun 17-36	Jun 7 37	—	—		
138	Acosta, S	Jul 16 37	—	—	—		
139	Arzate, Lawrence	Jun 22-36		Jun 11-37	Jun 22-37		6/6
140	Martinez, Pete G	Jul 15-37	—	—	—		
141	Araujo, Frank	Nov 9-36		Jun 11-37	Jun 21-37		
142	Garcia, Ramon	Mar 1-37	Jun 2-37		" 18-37		
143	Martinez, Angel	May 20-37	" 2-37		—		6/4
143	Cevallez, C M.	Jul 15-37	—	—	—		
144	Lemus, I	Dec 20-36	Jun 3-37		Jun 28-37		6/1
145	Pacheco, George	Jul 15-37	—	—	—		
146	Castillo, Ramon	Dec 1-36	Jun 3-37		—		
146	Martinez, Joe	Jul 15-37	—	—	—		
147	Mairs, P M	Apr 7 37		Jun 11-37	Jun 22-37		6/18
148	Mendoza, F	" 16-37		" 11-37	—		6/4
149	Macht, R A	Dec 24-36	Jun 8-37		Jul 23-37		6/1
150	Roddy, T A	" 31-36	" 3-37		—		6/1
150	Sanchez, R G	Jul 19 37	—	—	—		
151	Lozano, J B.	Apr 1-37		Jun 11-37	Jun 21-37		6/1
152	Carrizoza, J.	Aug 2-29		" 11-37	" 16-37		
153	Reed, G.W	Jan 7 37	—	—	—		6/4
154	Randy, George	" 7-37		Jun 11-37	Jun 28-37		6/4
155	Oliger, A	Apr 15-37		" 11-37	" 29-37		6/12
156	Timinez, P.	Oct 26-36	Jun 2-37		Sept 1-37		6/5
157	Alva, A	Mar 32		Jun 11-37	Jun 16-37		
158	McNutt, Lawrence	Jan 20-37	Jun 3-37		—	6/1	
158	Morrell J T.	Jul 13-37	—	—	—		
159	Rodriquez, R	Jun 30		Jun 11-37	Jun 16-37		
160	German, L.H	Jan 20-37	Jun 8-37		—	6/1	
161	Mills, A.W.	Sept 29	—	—	—		
162	Eaglin, M G	Feb 22-37		Jun 11-37	—	6/2	
162	Cervantes, R	Jul 23-37	—	—	—		
163	Garcia, I	Nov 27		Jun 11-37	Jun 16-37		
164	Osborne, E.	Feb 26-37		Jun 11-37	Jul 21-37	6/4	
165	Uhlry, W.	" 26-37	Jun 8-37		" 21-37	6/4	
166	Sill, E.R.	Apr 17-37	" 3-37		—		6/1
167	Herrera, C	" 17-37	" 3-37		Jul 7-37		6/1
168	Cordero, G	" 17-37	" 3-37		" 7-37	6/1	
169	Dye, Dallas	" 19-37		Jun 11-37	Jun 30-37		
170	Walker, J.C.	Nov 30		" 11-37	" 28-37	6/12	
171	Alorcan, A	Jun 26		" 11-37	" 18-37		
172	Martinez, J.	Dec 31	—	—	—		
173	Salgado, C	Jan 31		Jun 11-37	Jun 24-37		6/6
174	Lemus, Jim	Apr 20-37		" 11-37	—		6/6
174	Tapia, A	" 20-37	Jun 3-37		Jul 20-37		
175	Martinez, Frank	Jul 1-37	—	—	—		

Notes written across the day columns:
- Reed, G.W: On State Compensation
- Mills, A.W.: Working At Post Office
- Martinez, J.: Sick

Totals: 148 155 144 132 42 11 131 129 119 113 9 5 1 6 7 20 20 22 20 1 29 37 43 60 66 58 3 92 97 101 103 106 80 9 4 104 112 112 111 108 13 114 114 115 122 120 120 10 123 122 132 134 137 130 23 138 138 138 138 135 134

(Testimony of Arthur O. Bodine.)

Q. (By Mr. Howlett) Have photostatic copies been made of this exhibit, which you now refer to?

A. Yes, sir. I have seen them.

Q. And referring to the exhibit which I now hand you, is this a photostatic copy of those papers?

A. Yes, sir.

Mr. Howlett: Will you stipulate that may be the case, Mr. Mauritsen? [573]

Mr. Mauritsen: That that is a photostatic copy?

Mr. Howlett: Would you like to look at the original and check it?

Mr. Mauritsen: No.

Trial Examiner Stephenson: It will be stipulated that the document just testified to by the witness is a photostatic copy of the former document introduced in evidence as Respondent's Exhibit 1?

Mr. Mauritsen: And identified by the witness as to preparation.

Mr. Howlett: And that it may be used in place of the original document in evidence?

Mr. Mauritsen: So stipulated.

Trial Examiner Stephenson: Then the photostatic copy will be received in lieu of the original.

Mr. Howlett: We will excuse you, Mr. Bodine.

Trial Examiner Stephenson: Now, let the record show that the witness has been excused by the Respondent.

Now, Mr. Mauritsen, do you desire to call Mr. Bodine as the Board's witness?

(Testimony of Arthur O. Bodine.)

Mr. Mauritsen: Yes, I so desire. However, since it is almost noon, and as I have just received a rather voluminous document, perhaps a recess should be taken and then we can take up a little earlier. It will give us an opportunity to look at it. [574]

ARTHUR O. BODINE.

a witness recalled by and on behalf of the National Labor Relations Board, having been previously duly sworn, was examined and further testified as follows:

Direct Examination

Q. (By Mr. Mauritsen) Now, Mr. Bodine, referring to Respondent's Exhibit 1, you state that that was prepared under the supervision—under your supervision?

A. Yes, in my office force.

Q. And you are satisfied as to its accuracy?

A. I didn't have time to check it, but I feel the men that made it out was competent to make it out.

Q. Now, you are satisfied that this exhibit contains the record of all men hired during the month of May, 1937? A. June and July.

Q. Well, does not the exhibit give the time when the men were first hired, so that those who were in the employ of the company on June 1, 1937, and

(Testimony of Arthur O. Bodine.)

had been hired in May, would appear on the records? They would, would they not? [576]

Mr. Stuart: Just a minute, Mr. Mauritsen. There are men who went to work in 1929, but the record does not then say that we had all those men who were there in 1929. You only asked for June and July, and that is all that the record is supposed to cover. I don't think there is but one there that says—maybe one in '26, I am not sure, but certainly this does not mean to cover from '26.

Mr. Mauritsen: This is the month just prior to June 1, and the men who were at work on June 1, it would show all of the men who had been hired in May, 1937 and were still employed?

Mr. Stuart: If you want to ask him if anybody was hired in May, that is a different thing, but this record is only June and July.

Trial Examiner Stephenson: Now, let me have the question and the answer.

(The record referred to was read by the reporter as set forth above.)

The Witness: That is right.

Q. (By Mr. Mauritsen) That is, if they were in the employ of the company on June 1, 1937, and had been hired in May, 1937, their names would appear here?

A. Would be on that list.

Q. And also the names of the men who were hired the latter part of April, 1937, their names would appear if they were [577] working on June 1, 1937, would they not?

(Testimony of Arthur O. Bodine.)

A. That is right.

Q. Are you satisfied that all—withdraw that.

Are you satisfied that the names of all men—I withdraw that.

Are you satisfied that the names of all new men who were hired for the first time during the month of June, 1937, appear on this list?

A. May I have the question again, please?

(The pending question was read by the reporter as set forth above.)

The Witness: I feel reasonably sure they are on that list.

Q. (By Mr. Mauritsen) Are you satisfied that the names of all new men who were hired for the first time in July, 1937, appear on this list?

A. I feel reasonably sure that they are.

Q. Were any new men who had not worked for the company before, been hired subsequent to July 31, 1937?

A. Subsequent to July 31, 1937, meaning at—yes, but I couldn't give you the dates.

Q. But in addition to the new men hired in June and July there were new men hired after July, were there not?

A. I feel sure that there were some.

Q. There were some. [578]

You have your records of employment with you?

A. Yes, sir.

Q. Can you refer to your records and tell me when Tobal Rios was hired?

(Testimony of Arthur O. Bodine.)

A. I couldn't tell from these records I have here.

Mr. Howlett: Off the record.

(Discussion outside the record.)

Trial Examiner Stephenson: Now, you have produced other records, have you not, Mr. Bodine? You now have produced other records from which you will be able to answer Mr. Mauritsen's question?

The Witness: Yes, sir, I will try to do that.

Trial Examiner Stephenson: All right.

Mr. Mauritsen: Will counsel stipulate that the following, Anthony Duarte, Henry Garcia—I will withdraw that and start over.

Will counsel stipulate that the following men were hired on the respective days indicated and were not in the employ of Respondent on June 1, 1937: Anthony Duarte, August 23, 1937; Henry Garcia, August 23, 1937; James Cook, August 9, 1937; Arnulso Chavez, September 10, 1937 and Domingo Garcia on August 26, 1937?

Mr. Howlett: So stipulated.

Q. (By Mr. Mauritsen) Now, Mr. Bodine, have you found Tobal Rios? [579] A. Yes, sir.

Q. On what date was he first hired by the company. A. Employed August 25, 1937.

Q. Can you find the record of Mr. John Luna?

A. Yes, sir.

Q. On what date was he first hired by the company? A. July 21, 1937.

Q. July 21.

(Testimony of Arthur O. Bodine.)

Can you find in your records the record of employment of Mr. Jenaro Lopez? A. Yes, sir.

Q. On what date was he first employed by the company? A. August 12, 1937.

Q. Can you find in your records of employment the record of Mr. Simon Luna?

A. Yes, sir.

Q. On what date was he first employed by the company? A. August 16, 1937.

Q. Now these names to which we have referred are the names of new men who are hired—who were hired by the company subsequent to July 31, 1937?

A. Yes, sir.

Q. And Respondent's Exhibit No. 1 will show the names of all new men who were hired subsequent to June 1, 1937 and prior to July 31, 1937? [580]

Mr. Howlett: Just a minute. Read that again.

(The pending question was read by the Reporter as set forth above.)

Trial Examiner Stephenson: Prior to August 1.

Q. (By Mr. Mauritsen) Prior to August 1?

A. Yes, sir.

Q. I believe, Mr. Bodine, you have been present during the entire hearing, have you not?

A. Yes, sir.

Q. And you have heard the witnesses state that they applied to you for reinstatement, have you not? A. Yes, sir.

Q. Do you deny that they applied to you for reinstatement? A. No, sir.

(Testimony of Arthur O. Bodine.)

Q. In other words, you can recall that they did apply to you for reinstatement?

A. I think I recall all the witnesses who testified to that effect.

Q. Do you recall their having actually applied to you? A. Yes, sir.

Q. And you have heard these men testify that they had been employed by the company for a longer or shorter period of time, have you not?

A. Yes, sir.

Q. So that at the time when you were putting on these new [581] men you knew that older and experienced men were available, did you not?

A. Yes, sir.

Q. Mr. Bodine, why did you put on these new men rather than experienced men?

A. (Pause) I would first have to know who you refer to as experienced men.

Q. Well, you have heard and seen all the witnesses who have testified up to this time, have you not? A. Yes, sir.

Q. Well, why did you put on new men instead of these men? [582]

The Witness: Mr. Lucas is an experienced man. We have put no one in his place, filled his place at the plant. There is no new man in Mr. Lucas' position.

Q. (By Mr. Mauritsen) Then is that the reason why you didn't put any of the other experienced

(Testimony of Arthur O. Bodine.)

men back in place of—because their jobs were no longer in existence? Is that true?

Mr. Howlett: If counsel will point out the men he is speaking of, he will answer the question directly, I think.

The Witness: I was going to take up the next man that I would class as an experienced man.

Trial Examiner Stephenson: All right, go ahead.

The Witness: Could I just list those as I call them off so I can refer to them?

Mr. Howlett: Off the record.

(Discussion outside the record.)

Q. (By Mr. Mauritsen) Why was William G. Ashworth not re-employed instead of the new man? [583]

The Witness: Mr. Ashworth's experience consisted of handling tile and sewer pipe, the way we list experienced men. We have that operation classed as a laborer.

Q. (By Mr. Mauritsen) Yes; what is the answer to the question?

A. The answer is that we have been rotating, doing that work with setting crews from different operations; crews from different operations to that, and we have not a new man, to my knowledge, working in that department, in that department of the operation.

Q. Why was not Mr. Ashworth re-employed instead of a new man?

(Testimony of Arthur O. Bodine.)

A. The new men were employed for other operations than what Mr. Ashworth was doing.

Q. You have heard the witnesses testify, have you not, that in general they started out as laborers, and were then [584] assigned to a more skilled job, have you not? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. Would it not have been possible to put Mr. Ashworth back as a general laborer?

A. Mr. Ashworth, to be put back—if he had requested for general labor, we would have put him back.

Q. Did you ever offer to employ him as a laborer?

A. It was impossible for me to get around and call upon these men personally to offer them employment. A man seeking employment usually puts in his appearance and keeps in touch with us quite often, quite regularly.

Q. Where do you live, Mr. Bodine?

A. I live toward Elsinore.

Q. In the vicinity of Elsinore?

A. In the vicinity of Elsinore.

Q. Did you make any effort to get in touch with Mr. Ashworth?

A. No, sir. I never have made any effort to get in touch with anyone, devoting my time to it.

Q. Respondent's Exhibit 1 shows that men were being hired continuously during June and July of 1937, does it not? A. Yes, sir.

(Testimony of Arthur O. Bodine.)

Q. Did Mr. Ashworth ever apply to you for work during that [585] time?

A. I don't recall when he did.

Q. Do you know where Mr. Hannum lives in Elsinore?

A. I do not know his address.

Q. Do you have any record at the plant of the addresses of the men?

A. I have a record with me that will show.

Q. Oh, you have a record there?

A. Of their addresses as given.

Q. So it could have been a very simple matter for you to send a card to Mr. Ashworth, would it not?

A. When we find ourselves needing a man, usually we find that out probably the day that we have occasion to use him.

Q. But you have a record of the places of employment—or the places of residence of the men? I think you testified to that? A. Yes, sir.

Q. You knew where the president of the union lived, did you not?

A. I don't know, but I can look on the record and see.

Q. Do you know where the secretary of the union lived?

A. No, I positively do not know that. The secretary, oh, yes.

Q. You have a record of that?

A. The secretary I know. I know where he is. [586]

(Testimony of Arthur O. Bodine.)

Q. You have a record of the place of residence of the man?

A. Yes, sir, I know where the secretary is.

Q. Now, why was Thomas A. Roddy not re-employed instead of a new man?

A. Thomas A. Roddy was not employed because of inefficiency, and I would say stupid, not quick to receive instructions, and so forth.

Q. Now, Mr. Bodine, I think you testified the other day that you would not give a letter of recommendation unless you were satisfied that the man deserved it, did you not?

A. Yes, sir, I believe I so testified.

Q. Did you give Mr. Roddy a letter of recommendation? A. I believe I did, yes, sir.

Q. Did I understand you to testify just a minute ago that Mr. Roddy's work was not satisfactory?

A. Well, I was getting him mixed up with another man.

Q. Oh, then, his work was satisfactory?

A. I had him confused with another man, because my position doesn't bring me so that I get directly acquainted with the new men, right off the reel.

Q. Well, now, let us get this clear about Mr. Roddy. Was his work satisfactory or not satisfactory?

A. As far as I know, his work was satisfactory.

Q. In other words——

A. (Interrupting) He was working for Mr. Baer, under Mr. [587] Baer's direction.

(Testimony of Arthur O. Bodine.)

Q. You were satisfied that his work was of such a nature that he deserved a letter of recommendation, did you not?

A. Yes, sir, I give him a letter of recommendation.

Q. Now, Mr. Bodine. I show you a letter. Is that your signature?

A. (Examining document) Yes, sir.

Mr. Mauritsen: I should like to offer this in evidence at this time, as Board's Exhibit No. 9.

Mr. Howlett: This is a recommendation given Mr. Grier. That is not the one you are talking about. Roddy, I thought, was the one you were testifying about.

Trial Examiner Stephenson: This is somebody else?

Mr. Mauritsen: Yes.

Trial Examiner Stephenson: Off the record.

(Discussion outside the record.)

Trial Examiner Stephenson: The Board offers this in evidence, a letter dated June 18, 1937, addressed to whom it may concern, and signed L. A. Brick & Clay Products Company, by A. O. Bodine, plant superintendent.

It will be received in evidence and marked as Board's Exhibit No. 9.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 9.) [588]

(Testimony of Arthur O. Bodine.)

BOARD'S EXHIBIT No. 9

Los Angeles Brick & Clay Products Co.
1078 Mission Road
Los Angeles

Alberhill, Calif.
June 18, 1937

To whom it may concern

James Grier has been in the employ of this company for three and one-half years and has always performed his duties to our satisfaction.

We are glad to recommend him for truck driving and any kind of general labor.

LOS ANGELES BRICK & CLAY
PRODUCTS CO.
By A. O. BODINE
A. O. BODINE,
Plant Sup't

[Endorsed]: 1/10/38. Board's Exhibit No. 9.

Q. (By Mr. Mauritsen) Now, Mr. Bodine, did you give James Grier a letter of recommendation? A. Yes, sir.

Q. Were you satisfied with Mr. Grier's work before you gave him that letter of recommendation?

A. As far as I knew, Mr. Grier—I was satisfied.

Q. You made an inquiry of Mr. Mills, did you not? A. I had made no inquiry.

(Testimony of Arthur O. Bodine.)

Q. You were satisfied in your own mind that he deserved a letter of recommendation?

A. I gave him a letter of recommendation.

Q. Now, Mr. Bodine, why was Arnold Moss not re-employed instead of a new man?

A. We hired a new man in place of him because of the nature of the job.

Q. Did you hire any general laborers——strike that. Did you hire any new men to do the work of a general laborer?

A. As I recall, for general labor, for dry pan duty and clay wheelers, speaking of the men that we hired in the plant, and not the men that Mr. Mills hired.

Q. Did Mr. Moss work for you or for Mr. Mills? A. He worked under Mr. Baer.

Q. So that none of these new men who were hired were hired as general laborers, is that correct? [589]

A. Some of them in the clay mining.

Q. And Mr. Moss was engaged as a general laborer while he was at the plant, was he not?

A. Yes, sir.

Q. Mr. Bodine, why was James Grier not employed instead of a new man?

A. My position in his case was, as I found out later, that he had been discharged by Mr. Mills, which I didn't know at the time I give him the letter of recommendation, and I probably would have given him the letter of recommendation even so, although we didn't—when I am speaking about

(Testimony of Arthur O. Bodine.)

"we," I am speaking for the company—didn't need his services, as Mr. Mills had discharged him, I would give him a letter of recommendation and help him out because he might have fit in very well on some new employment.

Q. Now, did I understand—did I misunderstand you when you said yesterday that you wouldn't give a letter of recommendation unless you were satisfied that a man had done satisfactory work?

A. At the time I give the letter of recommendation, I had no knowledge of what he was doing wasn't satisfactory. I didn't discharge him and didn't make any inquiry to it.

Q. Why was Gerald D. Wenker not re-employed instead of a new man, Mr. Bodine?

A. Gerald Wenker was employed transferring, and that [590] position has not—has yet not become a steady position. It has been very limited, the amount of that work since Mr. Wenker was laid off. It is limited to probably three full weeks, I would judge, of actual operation on that job that Mr. Wenker was employed on.

Q. Mr. Wenker started out as a general laborer, did he not, at the plant? A. Yes, sir.

Q. And you testified that you hired general laborers since the strike was called off, have you not? A. Yes, sir.

Q. Did you offer Mr. Wenker a job as a general laborer? A. No, sir.

Q. Did Mr. Wenker apply to you for reinstatement?

(Testimony of Arthur O. Bodine.)

A. Mr. Wenker applied at least once that I recall. I don't know how many times other than that.

Q. Why was Mr. Hazelton not employed instead of a new man, Mr. Bodine?

A. Mr. Hazelton, as I was told, had gotten another job, and Mr. Hazelton, having had a higher rate of pay, in the position he had, I just hestitated to ask him, because of the fact that him to have been stepped down, I believed, would probably be humiliating to him to a certain degree, and that was the reason.

Q. Now, Mr. Bodine, I show you Board's Exhibit No. 4. Will [591] you inspect the list and tell me whether Mr. Hazelton's name appears thereon.

A. (Examining exhibit) Yes, sir.

Q. Now, Mr. Bodine, why was Lawrence C. McNutt not re-employed instead of a new man?

A. The places where we put the new men was not a job for a man with the education, in my oppinion, that Mr. McNutt has. I heard Mr. McNutt state one time that he had obtained a degree at U. S. C. and might be qualified for a better job than we had to offer.

Q. Did you make any attempt to find out from Mr. McNutt whether he would accept a new job?

A. No, sir.

Q. You recall that he applied for work after June 28, 1937, did you not?

A. Mr. McNutt applied for work; at the time I don't recall the date.

(Testimony of Arthur O. Bodine.)

Q. Did you ever tell Mr. McNutt that it would be better if he did not come on the company property?

A. No, sir, I don't recall ever making a statement like that.

Q. You don't recall that, but you are not sure that you made it or not, is that right?

A. I don't recall having made the statement.

Q. Mr. Bodine, why was Edward Hannum not re-employed instead of a new man? [592]

A. The job that Mr. Ed Hannum was employed on has as yet to this date not been filled due to lack of operations of that department. That department has been operated very, very little.

Q. Did Mr. Hannum ever work as a general laborer for you?

A. He worked under my supervision, of course, as superintendent, but in the yard under Mr. Gantz, or, I believe, under Mr. Harry Conger, I believe.

Q. Did you ever offer Mr. Hannum, that is, Mr. Edward Hannum, a job as a general laborer at any time when he applied? A. No, sir.

Q. Mr. Bodine, why was Henry Boontjer not employed instead of a new man?

A. Mr. Boontjer wasn't given a job for the simple reason that I didn't think he was qualified for anything that we had in the general laborer's line because of the nature of the work.

(Testimony of Arthur O. Bodine.)

Q. Did you ever give Mr. Boontjer a letter of recommendation?

A. I don't recall that I did. I may have. I could look at my records and see. I have a record that would show.

Q. Do you have your records here?

A. Yes, sir. I don't recall, but I wouldn't deny that I didn't.

Q. In other words, your recollection is hazy. You may have or you may not have?

A. I don't recall either way. [593]

Q. But you are certain that the reason he wasn't re-hired was because of his inefficiency?

A. No, sir.

Trial Examiner Stephenson: He didn't state that.

The Witness: No, sir.

Q. (By Mr. Mauritsen) I am not trying to mislead you. That is merely my understanding. I thought you said—or, because of the fact that you had nothing in the general labor line that he could fill.

A. I said due to the nature of the work that we would have to offer.

Q. Do you recall what Mr. Boontjer, what type of work he did for you while he was employed at the company?

A. I do not, except that he was classed as a general laborer.

(Testimony of Arthur O. Bodine.)

Q. But you hired new general laborers after June 28, 1937? A. Yes, sir.

Q. And I was incorrect when I stated that you did not hire him because of inefficiency?

A. I stated I didn't rehire him due to the nature of the work that we had to offer.

Q. Have you already testified about C. W. Lucas?

A. Yes, sir, he was the first man.

Q. And what was the reason why you did not hire Mr. Lucas instead of a new man? [594]

A. Didn't hire a new man in Mr. Lucas' place.

Q. Did you maintain a shop crew—I will withdraw that.

Do you now retain a shop crew?

A. Yes, sir.

Q. Did you maintain a shop crew from about July 1, 1937, to the present time?

A. Yes, sir.

Q. Did Mr. Lucas work in the shop prior to June 11, 1937? A. Yes, sir.

Q. Was he not the third man in order of seniority in that crew?

A. I can't answer that without looking at the records.

Q. I thought maybe you could recall it offhand. I believe he testified that he was.

How many men are there in the shop crew?

(Testimony of Arthur O. Bodine.)

A. I will have to count that up on my fingers. I will write it down, if I may. (Making notations) I believe I am correct in saying that we have five, actually four men in the machine shop.

Q. That is at the present time?

A. At the present time directly in the machine shop.

Q. How many men did you have in the machine shop on June 1, 1937?

A. I believe we had seven. I would like to add one man that is not in that shop crew, and that is Mr. Ed Baer who is a [595] graduate construction engineer who is working on construction, so that man is a new man and is not classed in the machine shop crew and is not working in the shop.

Trial Examiner Stephenson: But he is included among the four?

The Witness: No, he is the fifth man. He is on construction work.

Q. (By Mr. Mauritsen) Does Mr. John Hall now work in the shop crew?

A. Mr. John Hall, Mr. Hostettler, Mr. Travers, are in the carpenter shop.

Q. Well, then, Mr. Hall is not in the shop crew, is that what I understand you to say?

A. He is in the carpenter shop; the four machinists, the four mechanics in the machine shop, and Mr. Baer, a construction engineer.

(Testimony of Arthur O. Bodine.)

Q. Mr. Bodine, why was Sylvester Osborne not re-employed instead of a new man?

A. Mr. Sylvester Osborne was not employed because of the nature of the work we had to offer him.

Q. Well, I believe you said that once before, but I wish you would qualify it. What do you mean by it?

A. That work consisted of wheeling clay to the dry pans, and is a dirty, dusty job. The other jobs were in the clay.

Q. Would you classify him as a clay wheeler? [596]

A. Classify him as a laborer.

Q. Well, do you classify your clay wheelers as laborers, or is that a different classification within the general labor classification?

A. That comes under the classification of labor, clay wheeler comes under the classification of laborer. Mr. Osborne at the time he was laid off, I believe, was working on the yard truck. There has been no man steadily employed on the yard truck.

Q. But you have hired clay wheelers since June 28, 1937, have you not? A. Yes, sir.

Q. Why was Frank German not employed instead of a new man?

A. We didn't have any job other than laborer for Frank German, and to the best of my knowledge, Frank German and Lawrence German went

(Testimony of Arthur O. Bodine.)

back to the Dakotas. That is what I have been told, the impression I have.

Q. Did Frank German apply for re-employment at any time?

A. He has applied to me for re-instatement at some time or other, which I don't recall the exact time. I believe it was after the strike.

Q. You did not re-employ him at that time?

A. No, sir.

Q. Will you examine Board's Exhibit No. 4 and tell me whether Frank German's name was attached thereto? [597]

A. (Examining exhibit) Yes, sir.

Q. Why was Art Hannum not re-employed instead of a new man?

Trial Examiner Stephenson: Didn't we cover him?

Mr. Mauritsen: That was Ed Hannum.

The Witness: The tunnel kiln, where he was working, was not re-started until, I believe it was the 7th day of August, and I am under the impression that Art Hannum has gone from that vicinity by August 7.

Q. Well, how do you know that?

A. I heard that. I haven't seen him.

Q. Were you intending to offer him a job as burner on the kiln when it re-started?

A. No, sir, I was not.

(Testimony of Arthur O. Bodine.)

Q. Why were you so interested in his whereabouts, then?

A. The man wasn't available.

Q. Do you know that?

A. I am under the assumption that he wasn't available.

Q. Merely an assumption, never made any effort to verify it, did you?

A. No, sir, but the fact that Mr. Hannum had been asleep on that tunnel kiln, and an investment that involved as much as that, and the damage that could be done by a man sleeping, that would have to be ruled on by Mr. Larson before I ever would be able to put that man back on that job again. [598]

Q. That answers it.

You gave Mr. Hannum a letter of recommendation, did you not?

A. I didn't know until after Mr. Hannum had gone that Mr. Larson told me then, after I had—oh, I don't know how long after—quite some time after Hannum had walked off the job that he had caught him asleep. I didn't know that prior to that time.

Q. Well, which was the reason that Mr. Hannum wasn't employed? Was it because you were under the assumption he wasn't available, or because he had been asleep on the kiln?

A. We put one old employee on that kiln. [599]

Q. Why was Gregorio Cordero not offered employment instead of a new man?

(Testimony of Arthur O. Bodine.)

A. Cordero is it?

Q. Cordero.

A. (Examining record) Gregorio Cordero was re-hired July 7, 1937.

Q. I believe he testified to that effect. What was the occasion of his, or do you recall when he was re-hired, the conversation that took place at that time between you and him?

A. I recall that his being reinstated was delayed a few days there over some question which involved him in some disturbances over in the company camp. The complaints that came to me through Cruze, deputy sheriff in charge up there who had the afternoon to twelve o'clock midnight shift, that people had complained about him going on, about a lot of loud talk and so forth, keeping those families awake at night. So he said, "No," that he hadn't done that, so that was all I recall he said. The next thing Cordero brought a letter stating that he had been employed by Mr. Enos, who had charge of the construction of the Alphabeta store, in Elsinore, the [601] fact that he recommended him for work, that he was through, or words to that effect, and that was when we put Cordero back to work.

Q. And his going out on strike had nothing to do with the furnishing of this letter that he had secured?

A. I didn't ask Mr. Cordero for the letter, or to present a letter at all. I told him I would just wait

(Testimony of Arthur O. Bodine.)

for a few days. He went and got the letter and brought it on his own authority. I didn't ask him to get the letter. He volunteered to furnish the letter and brought it to me. That had no bearing on whether he went back to work or not.

Q. What was all this purpose in telling us about this disturbance he had been causing? Why didn't he furnish a letter stating that he hadn't been causing the disturbance instead of that he had been working?

A. I don't know what his object was.

Q. Did you ever ascertain whether he had caused the disturbance or not?

A. I don't know to this day.

Q. But that was the reason you told him you couldn't rehire him because you had heard this report, is that right?

A. I just delayed my decision a couple of days.

Q. You just brought the report over and then, for no reason at all, just decided to re-hire him, is that right?

A. I decided the man was worthy of re-hiring. [602]

Q. Now, on September 1, you had 154 men employed in the plant, did you not? A. 153.

Q. 153, which was 13 less than you had employed on June 1, 1937, was it not?

A. That is correct.

(Testimony of Arthur O. Bodine.)

Q. Now, in regard to a number of these witnesses, you have testified that no work was available that was suitable for them, have you not?

A. Yes, sir.

Q. Can you tell the Examiner what operations had not been resumed on September 1 that had been carried on on June 1, 1937?

A. May I have that question?

(The pending question was read by the reporter as [604] set forth above.)

The Witness: September 1, what operations—I would have to refer to the records in order to state that.

Q. (By Mr. Mauritsen) I mean in a general way, Mr. Bodine, you are superintendent of the plant, and you have an idea of what is happening throughout the plant, do you not?

A. I think the operations are practically the same.

Q. In general, by September 1, you had resumed practically the same operations that you had carried on on June 1, had you not?

A. Well, not in as large a tonnage. That is the point I am getting at.

Q. But, with minor exceptions, you were doing practically the same thing on September 1 that you were doing on June 1, is that right?

A. I would say that is correct. [605]

Also we should like to have the record held open for the testimony of Charles Bland who has been injured and is at this time unable to testify because of a brain concussion, but we hope to get his testimony at some later date, and we will make an effort to make it reasonably soon.

Trial Examiner Stephenson: Your request will be granted.

Now, you made the statement, Mr. Mauritsen, that the Board's case was in so far as the Complaints are concerned, [608] except those reservations that you made, but you also reserve the question of jurisdiction?

Mr. Mauritsen: The jurisdiction, surely.

Trial Examiner Stephenson: But insofar as the alleged unfair labor practices are concerned, your case is finished. Very well. [609]

GEORGE RANDY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: George Randy.

Direct Examination

Q. (By Mr. Howlett) Mr. Randy, you have been employed by the L. A. Brick Company?

(Testimony of George Randy.)

A. Not now.

Q. Have you ever been employed?

A. Yes, sir.

Q. And how long ago were you employed?

The Witness: First employed in 1924, the latter part of September, 1934. [610]

Q. (By Mr. Howlett) How long did you work there?

A. I worked ever since to October 2 of this year, 1937.

Q. And when did you leave?

A. About the—last laid off on October 2.

Q. Of this year? A. This year.

Q. Do you know Mr. Cordero?

A. Yes, sir.

Q. Did you ever work with him?

A. Yes.

Q. When was the last time that you did work with him?

A. The last time I worked with him was about the latter part of September.

Q. You refer to Gregorio Cordero, do you?

A. Yes.

Q. During the time that you worked with him, did you have any conversation with him relative to your work?

A. Yes; he had been telling me I was working too fast, that they didn't like to work that way, like to sit down once in a while. Finally I com-

(Testimony of George Randy.)

plained and said, "If you want to work the way you want to, you have your side of the kiln and I have my side. I work my side and you work on your side." Finally they get mad and we got in a fist fight several times and they called me names in Spanish. I understand quite a bit of Spanish and they threatened me, going to beat me up, they said. [611]

Q. You refer to "they." Who do you mean by "they"?

A. Both of them, brothers. They claim they are brothers, him, Gregorio and his brother.

Q. About when did that happen?

A. Well, we had been working pretty near all month of September together.

Q. Of 1937? A. 1937, yes, sir.

Q. You stated that you reported that. Who did you report that to?

A. To Harry Gantz. [612]

HARRY GANTZ.

a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and further testified as follows:

Direct Examination

Q. (By Mr. Howlett) Mr. Gantz, did you hear the testimony of Mr. Randy?

A. Yes, sir.

(Testimony of Harry Gantz.)

Q. Do you have any recollection of ever having discussed that with him? A. Yes, sir.

Q. When did that occur?

A. Well, it happened—well, it happened shortly before, just a day or so before I laid Cordero off.

Q. What did he tell you at that time?

A. George came up and told me that Cordero was always arguing with the fellows in the gang, and he said that he couldn't work with him. He said he was always squawking about how fast he worked, and also told him that—he said, "You fellows are not working contract. What do you want to kill yourselves for?" He said, "Slow up," and George also said that Cordero said if I fired him, he would get me up in town some time and give me a good trimming.

Q. Anybody else present at that conversation?

A. No, sir. I might also change that a little bit. He said, [613] when I get up in town and get a few drinks in me, he says, "I will give him a good trimming." That is the exact words he repeated.

Q. Did you have a conversation with Mr. McNutt on June 2 relative to his joining or not joining the C. I. O.? A. Yes.

Q. Where did that take place?

A. Well, around the kiln; it might have been in the kiln or out of the kiln.

Q. Who was present besides you two?

(Testimony of Harry Gantz.)

A. I don't remember anybody else being present. Of course, the other men work around the kiln; they might have been in or out of the kiln. I didn't pay any attention to them.

Q. Mr. McNutt testified that you told him at that time that they were damn fools to join the C.I.O. Is that true? A. No, sir.

Q. Did you make such a statement?

A. No, sir.

Q. When did you discharge Mr. McNutt?

A. Yes, sir.

Q. When was that?

A. The 2nd, when the day they was laid off. I just don't remember the date, whether it was the 2nd or 3rd.

Q. Of what month and year?

A. During the strike, right about the strike. [614]

Q. What month or year?

A. 1937, and in June.

Q. The time you discharged him, did you tell him why you discharged him?

A. Well, I told him that lack of business, to start with.

Q. Was there lack of business at that time?

A. Yes, sir. [615]

Q. Referring to Mr. McNutt again, did you at any time give him any reason why he was laid off other than what you have stated?

(Testimony of Harry Gantz.)

A. Well, I never give him any definite reason, but I had McNutt on other jobs besides drawing, such as loading brick, and we didn't have any drawing to do, see, and he was just too [616] light for the job. He couldn't wheel brick; just wasn't built for it and couldn't load pipe. He was too light to hoist the pipe up on top of the truck.

Q. Were those parts of his duties?

A. Well, it would be as long as he worked for me.

Q. Well, did he do that work?

A. Well, he tried to do it.

Q. Then what arrangement did you make, if any?

A. Well, he just wheeled about half the brick that the other men wheeled, and I just let him get by with it until he could get back into the drawing game. It was harder work.

Q. How long did he work there for you?

A. He worked for me all the time he was with the company. [617]

A. Well, we never talked about the work so much. One time he mentioned about the union.

Q. Who started that conversation?

A. Bill did, Mr. Ashworth.

Q. What did he say?

A. Well, he asked me what I thought about the union, and I made the remark and asked him, and said, "Well, if the union is anything like the

(Testimony of Harry Gantz.)

speaker, why, I don't think I would want to have anything to do with it."

Q. As I understand, you testified previously that you worked under Mr. Bodine? A. Yes.

Q. Have you received instructions at any time to discharge any of the men that were let off?

A. Have I received any instructions?

Q. Yes. Did you have any instructions to lay men off?

A. No, I laid the men off, myself.

Q. You did that of your own——

A. (Interrupting) Yes, sir.

Q. And why did you lay them off.

A. Well, I got rid of the fellows, the weak sisters, due to lack of business. I just picked those certain men. [620]

Cross Examination

Q. Now, did I understand you to testify that no instructions [621] were given you as to lay-offs, that you did that merely on your own initiative?

A. Well, we had conferences, of course. The orders to lay off come through Mr. Bodine, but I selected my own men what to lay off.

Q. And you said that you laid off the weak sisters, I believe? A. Yes, sir.

Q. Do you know Bill Ashworth?

A. Yes, sir.

(Testimony of Harry Gantz.)

Q. Did you know him for some time?

A. Since January 1, 1937.

Q. Have you been friendly with him during that time? A. Yes.

Q. Did you ride to work with him?

A. Yes.

Q. All the time? A. Yes.

Q. Was he one of the weak sisters to which you referred? A. Yes, sir.

Cross Examination

Q. (By Mr. Gately) I would like to have a definition of what a "weak sister" is.

A. Well, just a man that maybe can just do a certain kind [622] of work, and we couldn't take and put him any place in the yard and do general brick yard work, such as wheeling clay to a pan. I would say in loading sewer pipe, handling 15 and 18-inch sewer pipe, a man of his type could never do it. He was just too light. You would just injure a man if you tried to put him on that kind of work. [623]

ARTHUR O. BODINE,

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and further testified as follows:

(Testimony of Arthur O. Bodine.)

Direct Examination

Q. (By Mr. Howlett) Mr. Bodine, I believe you testified at a previous time that there had been some conversation between you and Mr. Larson relative to the necessity of laying off men. Is that correct?

A. That is correct.

Q. When did that conversation take place?

A. Well, it had been taking place for a couple or three weeks prior to the time we put it into effect.

Q. And that went into effect on the 2nd or 3rd day of May, I believe you previously testified?

A. 2nd of June.

Q. June.

Prior to the time that the men were laid off, what notice did you give to them?

A. Prior to the time they were laid off? We posted a notice on the clock.

Q. I will show you a letter here and ask you what it is.

A. (Examining document) That is a notice that I had posted on the clock. [624]

Q. Is that an original or a copy?

A. That is a copy of the original.

(The document referred to was passed to Mr. Mauritsen.)

Q. (By Mr. Howlett) Do you know what has happened to the original notice?

(Testimony of Arthur O. Bodine.)

A. The original notice was posted on the clock.

Q. Do you know what has happened to that original notice? A. It has been destroyed.

Q. Is this a carbon copy of it?

A. A carbon copy.

Q. Made at the same time?

A. Made at the same time.

Mr. Howlett: I offer that as Respondent's Exhibit 2.

Trial Examiner Stephenson: Any objection, gentlemen?

Mr. Mauritsen: No objection.

Trial Examiner Stephenson: It will be received in evidence and marked as Respondent's Exhibit 2.

(Thereupon the document above referred to was received in evidence and marked as Respondent's Exhibit No. 2.)

RESPONDENT'S EXHIBIT NO. 2

Alberhill, Calif.
June 2, 1937.

N-O-T-I-C-E

Due to the sharp decline of business the past thirty days and the lack of orders on hand, it has become necessary for this company to reduce its personnel to a place where it will be commensurate to the amount of business we are doing.

(Testimony of Arthur O. Bodine.)

Any man affected by this reduction will be considered for re-employment at such time as business warrants increasing the personnel.

LOS ANGELES BRICK &
CLAY PRODUCTS CO.

[Endorsed]: 1/10/38. Respondent's Exhibit No. 2.

Q. (By Mr. Howlett) And, after you had the conversation that you have testified to with Mr. Larson, or a series of conversations, what was done?

A. You mean after we had decided to definitely —that we were going to cut the personnel? [625]

Q. Yes.

A. Well, I took it up with Mr. Baer and Mr. Gantz as to who they would suggest that we would lay off, with the point in mind that we wanted to keep the greatest efficiency in our organization in so doing.

Q. Did you determine at any time the number of men to be laid off?

A. I did not determine the number of men.

Q. Well, how many men were laid off, approximately? A. I believe——

Mr. Mauritsen (Interrupting): At what period of time?

Mr. Howlett: June 2nd and 3rd, 7th and 8th.

The Witness: I believe it was 43 men, or 66 men. I don't recall now which.

Q. (By Mr. Howlett) How many men did you keep?

A. We kept—oh, I think around 120 men. I would say roughly around 120 men that we had left.

Q. What was the reason at that time, if any, for laying off that number of men?

A. Well, it was a decline in business.

Q. How were the stocks at that time on hand?

A. Our stocks were well up. [626]

Q. You know Mr. Hazelton, do you not?

A. Yes, sir.

Q. What was his position with the company?

A. His position was pipe sorter. [627]

Q. What does that mean?

A. That means grading the pipe as to their quality.

Q. When is that pipe graded, after it is made?

A. It is taken, upon being hauled to the yard from the kiln, at the time it is piled in stock.

Q. Did you ever have any complaints on the grading of the pipe on orders filled during the month of——

A. (Interrupting) Yes, sir.

Q. (Continuing) During the past year, within the year of 1937?

A. Yes, sir, I have had complaints. We get complaints right along.

Q. Well, what were they?

A. Cracked pipe, chipped pipe and so forth.

Q. Do you have any specific occasions that you recall?

(Testimony of Arthur O. Bodine.)

A. Well, I know our largest complaints and damages were noticed on the Kruly job at Laguna Beach.

Q. When was that job?

A. Oh, that was done during, I would say, probably March, somewheres around there, in '36.

Q. What was the nature of that complaint?

A. Broken pipe, chipped, cracked pipe.

Q. Did you have any other complaints during the year 1937, during the time Mr. Hazelton was testing pipe?

A. Yes. We had complaints on the San Jacinto job. [628]

Q. Do you recall the date that Mr. Hazelton left his employment? A. I don't recall.

Q. Having been laid off, do you wish to refer to this exhibit, Respondent's Exhibit 1?

The Witness: June 3, according to this document.

Q. (By Mr. Howlett) Since that time have you had any claim for cracked pipe that you recall?

A. There has been a very noticed reduction in the amounts of the claims. [629]

Q. Do you know Mr. Damron?

A. Yes. [630]

Q. Did you have a conversation with him on July 17 or 18 in connection with—at the time there was a discussion as to the matter of the unions?

A. No, sir, not that I know of.

Q. Mr. Ashworth testified that you told him that if any of the men became active in the union that

(Testimony of Arthur O. Bodine.)

they would not be permitted to work for the company. Do you recall having made such a statement?

A. No.

Q. Did you make such a statement?

A. No, sir.

Q. At the time you received the notice referred to as Board's Exhibit 2, who gave you that notice?

A. Mr. Lucas.

Q. Did you have any conversation with him at that time?

A. None other than he said that he had to have a reply.

Q. Did he tell you at that time that a strike would be called?

A. Nothing said about the strike being called.

Q. Was there any conversation of any kind relative to the strike being called? A. No.

Q. Did you have any conversation with any of your men prior to the time in which any one of them told you a strike would be called? [631]

A. No, sir.

Q. On June 11, 1937? A. No, sir. [632]

Q. (By Mr. Howlett) Now, Mr. Bodine, Mr. Osborne, Sylvester Osborne, testified that you said: "We boys be careful what we sign after that."

Then you further said, "You boys be careful what kind of paper you sign after this. That is what he told me when I first asked him for the job."

Did you tell him that? A. No, sir.

(Testimony of Arthur O. Bodine.)

Q. Mr. Lester C. Hazelton stated that on the 1st day of May, 1937, that you came around to him and called him off to one side [636] and told him that he thought maybe the union would come in there—speaking of you—and if it did, there wouldn't be no chance for the bonus for Christmas like there was last year.

Did you make that statement?

A. Nothing said about a bonus, no. I had no knowledge of any bonus.

Q. He further testified that you stated there would be no chance if the union came in for a bonus and for me—referring to him—to kind of spread it around the yard among the boys. Did you make that statement to him? A. No.

Q. He further testified that you stated to him in case the unions come in here there wouldn't be no chance for a bonus this coming year like there was last year. Did you state that?

A. No, sir.

Q. Did you say anything like any of those statements I have just made? A. No, sir.

Q. Did you tell him to spread the news around and tell the boys? A. No, sir.

Q. Mr. Hazelton further testified that you told him as follows: "I guess you have heard about the union? That there [637] was a lot of union talk around Los Angeles and some of the companies up there had signed for it, and he said maybe it would

(Testimony of Arthur O. Bodine.)

come down that way, and if it did, he told me to use my own judgment about signing up for it."

A. At the time I—the union activities were entering the clay industry, I did mention to Lester Hazelton that probably, without a doubt, or probably—I don't recall which—that the unions would be coming up to visit us, and if they did, for him to just find out what they had to offer him and use his own judgment about what he did.

Q. You heard the testimony of Gregorio Cordero, did you not?

A. I heard the testimony. I don't recall just——

Q. (Interrupting) He testified as follows:

"Q. Then when did you apply the next time after the first of July?

"A. He told me to come about five or six days; and one day Mr. Bodine pulled me and one or two boys aside, and he told me he was afraid he would have to put off the work because they had some reports that I was making a lot of trouble in the case of the union; that I was making a lot of trouble with the boys there, and that was the reason he didn't want to put me to work again; that there was nothing the matter with my work, but that was the reason he didn't want to put me to work." [638]

Did you have any conversation about that time?

A. I told him to come back in a couple of days.

Q. Did you make the statement I just read that he testified to?

(Testimony of Arthur O. Bodine.)

A. No. I told him that due to the—due to it to come back in a couple of days; that I had heard about this disturbance.

Q. Mr. William D. Ashworth testified that on June 2—withdraw that—was asked the question:

"Q. Had you ever discussed with any of these foremen at the plant about the union?

"A. On June 2, that was the next day after the first organizational meeting in the Legion Hall at Elsinore—" withdraw that.

He further testified as follows, referring to you, as making the following statement:

"I think it would be favorable for you boys to forget the L. A. Brick Company."

Mr. Mauritsen: I think that question is uncertain and should be clarified. By whom was that?

Mr. Howlett: I will read the rest of it.

Mr. Mauritsen: Who made the statement?

Mr. Howlett: I am still talking about Hazelton.

Mr. Mauritsen: I object to it.

Mr. Howlett (Interrupting): This is Ashworth. [639]

Mr. Mauritsen: It seemed to me that you were talking about Ashworth.

Mr. Howlett: This is Ashworth. Do you have an objection to it?

Mr. Mauritsen: I object to it on the ground it is indefinite and unclear.

Mr. McLaren: He stated it was Ashworth.

(Testimony of Arthur O. Bodine.)

Trial Examiner Stephenson: Objection is overruled. Read the question.

(The pending question was read by the reporter as set forth above.)

The Witness: I don't recall making any such statement as that.

Q. (By Mr. Howlett) Mr. Lucas testified his connection with the petition that was presented, it was as follows, referring to what you said:

"He simply said they wouldn't take any action on the petition, that it didn't have any backing, and they couldn't do anything about it; that they wouldn't have anything to do with it; that we didn't have anything to back us up in our complaint on it —in our demands, and they would ignore it."

Did you make that statement to him?

A. No, sir.

Q. Did you make any statement similar to that?

A. Mr. Lucas told me that he had to have an answer to that [640] petition. After I had gotten Mr. Larson's say on that, I told Mr. Lucas about four-fifteen in the afternoon that I had taken the matter up with Mr. Larson; that he had said he couldn't do anything about it until he had consulted with the directors, or called a directors' meeting—I don't know just how that was—anyway, he said he couldn't do anything about it until that time. I said nothing further. [641]

(Testimony of Arthur O. Bodine.)

Redirect Examination

Q. (By Mr. Howlett) Mr. Bodine, can you tell the Trial Examiner about the products that you manufacture here, how many there are?

A. We manufacture sewer pipe, roofing tile, hollow tile, [650] face brick, fire brick, floor tile, acid brick, flue lining, drain tile, and that, I believe, covers it. [651]

GUSTAF LARSON

a witness recalled by and on behalf of the National Labor Relations Board, being previously duly sworn, was further examined and testified as follows:

Direct Examination [669]

Q. Mr. Larson, have you ever given any instructions concerning Union activities to your foremen or your men? A. Never have.

Q. Have you ever said anything to any of them about the Union, to the men? A. Never.

Q. It has been testified here that there are a number of men that were laid off and a number of men that left the work, struck on June 11, 1937.

Referring to both groups, are you willing to take those men back to work? A. We are.

Q. Under what conditions?

A. Under the condition that they are good workers, qualified for the work they are asked to do.

(Testimony of Gustaf Larson.)

Q. Do I understand you to say that you will take them back [678] whether you have the work or not?

A. Providing we have got work for them. [679]

Cross Examination

Q. I think you testified that after the strike this kiln was not opened or not started again until August, did you not? A. Yes.

Q. Was that in the forepart or the latter part of August?

A. The first part of August. [684]

Q. Now, Mr. Larson, you stated that you were willing to take these men who joined the Union back, did you not? A. Yes, sir.

Q. That is, you are willing at this time to take them back? A. I am.

Q. (By Mr. Mauritsen) Were you willing to take these men back in June?

A. Always have been willing.

Q. Were you willing to take them back in July?

A. Always.

Q. Were you willing to take them back in August? A. Always.

Q. Mr. Larson, why were new men employed rather than the Union men during all this time?

A. Well, I will explain. There might be exceptions, one [687] or two. When we needed men, suppose we needed men, we wanted to keep the ma-

(Testimony of Gustaf Larson.)

chinery running and when orders came in we may have been needing ten or fifteen men to take care of eight or ten men that were sick or maybe we get a small manufacturing order to make quick; we may take some men and we haven't got time to mail postal cards or to run over the country to help the men to come back. If the men are so anxious to come back, they ought to come to the plant and look for work, not sit around in the kitchen, because we are not going after them.

Q. Now, Mr. Larson, I believe that you testified that you found Mr. Art Hannum asleep on the kiln some time before the strike was called, is that correct? A. Yes, sir.

Q. Did you discuss this replacement or discuss his discharge with Mr. Bodine?

A. No, I never did.

Q. You never did?

A. No, I discussed it with Jack Baer.

Q. Did you discuss it with Mr. Baer before or after the strike?

A. The following Monday morning after he was asleep; I caught him asleep Sunday at 4:00 o'clock in the afternoon. The following Monday I was up there between 9:00 and 10:00 and I told Mr. Baer, and we were just about to close down the [688] tunnel kiln, in about fifteen to eighteen days more we would have to close it, and I didn't want to change, break in a burner or take another apprentice for

(Testimony of Gustaf Larson.)

that length of time. That is the reason he wasn't fired right away.

Q. Did you discuss it with him before the strike —you discussed it with him before the strike, did you not?

A. No, I discussed it with Jack Baer.

Q. I mean with Jack Baer, before the strike.

A. The next Monday morning. This was the first of June, Decoration Day was the 30th, a Saturday, the 31st was when I caught him sleeping—Monday was the 1st of June and that is the day that I took it up with Jack Baer.

Q. Well then, you were at the plant on June 3rd, 1937? A. Yes.

Q. And you saw that these hand-bills had been distributed then, did you not?

A. I don't know whether I saw it or not; I got them distributed in my office, someone brought them in.

Q. But you saw the hand-bills announcing that a meeting was to be held that night?

A. I don't say whether I did—so far as the evening or day is concerned, but I had a hand-bill delivered in my office.

Q. Now, Mr. Larson, I show you Board's Exhibit 4. I believe that you testified as to its receipt the other day, [689] but I would like to establish the date, if possible, on which you received the orig-

(Testimony of Gustaf Larson.)

inal of which that letter is a copy. Do you recall on what date you received that letter?

A. Well, I received one letter, this was similar, the day or the day following the day after the meeting we had with Nylander. If the meeting was on Tuesday with Nylander, Thursday I received the letter.

Q. Well, I mean now—you received a letter similar to this?

A. Either that or similar, the letter I received from him.

Redirect Examination [690]

Q. (By Mr. Howlett) Mr. Larson, you have heard testimony given in this case about letters of recommendation? A. I have.

Q. Were those letters given as a matter of policy of your company or why were they given?

A. I have done that for the last forty years. Any man that works for me, even if I fire *me,* if he hasn't been a criminal, I thought I would help him out on work outside, and that has been my policy but if it is not the policy of the Government, if that is a crime, I will discontinue it and never do it again. [693]

JOHN BAER

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [696]

(Testimony of John Baer.)

Trial Examiner Stephenson: State your name, please.

The Witness: John Baer.

Mr. Mauritsen: Mr. Examiner, at this time I believe that various witnesses have testified as to occurrences concerning Jack Baer. Can it be stipulated that this is the man who has been referred to as Jack Baer? He is the assistant superintendent, is he?

Mr. Howlett: Yes, that will be so stipulated; stipulate that that is Jack Baer, I don't know about what was said.

Mr. Mauritsen: I don't mean to stipulate as to what was said, I didn't intend to frame my stipulation that way.

Mr. Howlett: Yes, certainly, we stipulate that this is Jack Baer.

Q. (By Mr. Howlett) What is your occupation?

A. I am a ceramic engineer.

Q. Where are you employed?

A. At the Los Angeles Brick & Tile Company at Alberhill.

Q. How long have you ben employed there?

A. About two years.

Q. Were you working at Alberhill plant on June 11th, 1937? A. Yes.

Q. You worked there several months previous thereto, continuously, did you? A. Yes.

(Testimony of John Baer.)

Q. Did you ever have any instructions from anyone of your [697] superiors in regard to union matters? A. No, I did not.

Q. Have you ever talked to any of the men about the Union or Union activities?

A. Well, have you ever? Will you qualify that?

Q. During the time now under discussion.

A. Well, yes, I have.

Q. Well, on what occasions?

A. Well, previous to the time of the strike—well, first, may I explain that part of my duties are the operation of the tunnel kiln and in this operation there are three burners, three shifts and on different occasions, the exact time I can't tell you, two of these burners came to me—that is, came singly and asked me what I thought about the Union.

Q. What were these men's names?

A. Art Hannum was one and Leland Fuller was the other.

Q. What did Art Hannum say to you?

A. Art Hannum asked me if I thought the Union was all right and I said I didn't know a thing about that organization but I explained to him that he should be sure, if he signed in that Union, that he understood completely what he was signing.

Q. Did you give him any instructions as to joining or not joining?

A. No, I did not. [698]

(Testimony of John Baer.)

Q. Did you give him any advice as to joining or not joining? A. No, I didn't do that.

Q. Did you say that he couldn't join?

A. No, sir.

Q. That is, work would be taken away from him if he did join? A. No, sir.

Q. When did you talk to Mr. Fuller—withdraw that—when did Mr. Fuller talk to you?

A. Well, the exact date is hard to determine. It happened during this particular period that the shifts were so arranged that Fuller and Hannum were the men that I saw in the day time.

Q. And what did Mr. Fuller ask you at that time?

A. He asked me what I thought of the Union.

Q. Did he ask you substantially the same question that Mr. Hannum had asked you?

A. Yes, sir, he did.

Mr. Howlett: I must object to counsel leading the witness.

Trial Examiner Stephenson: Yes, that was somewhat leading. We will allow that question and the answer to stand but try and avoid leading the witness.

Q. (By Mr. Howlett) Well, what did he say to you at that time? [699]

A. Well, he asked me what about joining the Union and whether the President, or I believe I was talking to Hannum about it; I said the same thing

(Testimony of John Baer.)

to him, to be sure when he signed that he knew all about it, what he was signing, and he told me in turn that he had already signed.

Q. He was working there at that time, was he?

A. Yes, he was.

Q. Is he working for the company at the present time? A. Yes, he is.

Q. What position does he hold?

A. The same position as he held at that time.

Q. Did you ever see—withdraw that—during the time of the strike did you see Mr. Fuller?

A. No, I don't remember that. I will qualify that. What do you mean "during the time"?

Q. During the strike, it was between July 11th, 1937, and June 27, 1937—no, I mean between June 11, 1937 and June 25, 1937?

A. No, I don't believe I saw him in that period, that is, not to speak to; I may have passed him on the road.

Q. Were there any picket lines around your establishment at that time? A. Yes, there was.

Q. Was he in that picket line?

A. I did not see him in the picket line. [700]

Q. Did he ever talk to you again about any Union matters? A. No, he has not.

Q. Does Luie Juarez work for you?

A. Yes, in the plant.

Q. Does he work under your supervision?

A. Yes, he does.

(Testimony of John Baer.)

Q. Did you ever talk to him about Union activities? A. No, I did not.

Q. Did you ever see him in the picket line?

A. Well, not to be certain, no, I don't say that I did.

Q. Do you know what office, if any, he holds with the Union?

A. No, I believe that he is the vice-president, though I wouldn't be sure, I am not qualified to answer that.

Cross Examination

Q. (By Mr. Mauritsen) Mr. Baer, did you attend the Union meeting held June 1st, 1937, in the American Legion Hall in Elsinor?

A. I attended—well, I can't—a part of the meeting I was there, yes.

Q. Did you arrive late, is that correct?

A. Late, that is what I did.

Q. You weren't there at the beginning of the meeting? [701]

A. No, I was not.

Q. Had you seen these hand-bills distributed throughout the plant? A. Yes, sir, I had.

Q. Did you see any invitation to attend that meeting?

A. Well, not particularly, no, not personally.

Q. But you saw the hand-bills that there was to be a meeting and were naturally curious, was that it?

(Testimony of John Baer.)

A. That's the idea, no one was restricted, so I attended.

Q. Did I understand you to testify on direct examination that you did not know a great deal about Unions?

A. I did not know a great deal about them—I didn't say anything of that nature.

Q. Do you know anything about the Unions?

A. No, not a great deal.

Q. So you wouldn't know whether you would be eligible for membership in a Union or not?

A. Will you state that question again, I don't understand.

Mr. Mauritsen: Read the question, please, Mr. Reporter.

(Question read.)

A. Well, in my present position I am not eligible for that type of Union, I know that.

Q. You know that? A. Yes.

Q. And you knew this at the time of the Union meeting of [702] June 1st, did you not? A. Yes.

Q. What, then, was your purpose in attending this meeting on June 1st?

A. The meeting was—as I understood it—an open meeting and so we attended to merely see what —who was speaking and what was going on and what the activity was.

Q. Now, when you refer to "we" whom do you have reference to by "we"?

A. Well, "we" I mean "I." I attended myself, I came alone late to that meeting.

(Testimony of John Baer.)

Q. Had you discussed—strike that—after finding the hand-bills, had you discussed the meeting with any of the other foremen in the plant?

A. No, not to my—that is, I don't recall it; I may have mentioned it; I don't recall any particular discussion about it.

Q. When you arrived late at this meeting did you see any of the other foremen there in attendance? A. Yes.

Q. Which of the other foremen did you see at that meeting?

A. Mr. Bodine was there; Mr. Mills, Mr. Gantz. That is all I recall; there may have been more but I don't remember.

Q. When did you leave the meeting?

A. Well, it wasn't completed, it was rather—well, I [703] don't know how much longer it did continue. I was there for perhaps three-quarters of an hour.

Q. Well, you say you arrived late. Did you leave early?

A. I left early, I believe, because everyone was in the hall, or practically everyone when I left.

Q. What were they doing in the hall when you left, just to fix the time?

A. This man, the organizer, or whatever he was, his position was very vague, had asked if any of the men wanted to join and had asked them to come up to this table to see some sort of a paper or to sign an application to join the Union and of course I

(Testimony of John Baer.)

was not interested so I left, just shortly—it was shortly after that that I left.

Q. At that point you had suddenly lost interest in the meeting, is that right?

A. Not suddenly; I had lost interest right from the start. It was a very dull meeting.

Q. Did anyone accompany you from the meeting?

A. Well—accompanied me? I came in my own car.

Q. Well, did anybody leave with you?

A. No, I left—at the time I left I left alone. Several men had gone before me, the superintendent was one of them, and I left, oh, I imagine three or four minutes after he did, five, I couldn't tell the exact time.

Q. Now, let's establish definitely when you did leave the [704] meeting. Mr. Bodine has testified that he left after two men had gone up to sign and you testified you left three or four minutes later. How many of the men had gone up to sign at the time when you left?

A. Well, to be very frank with you, we were in a group—I was with a group of the working men talking at the time about—well, just general conversation about this organizer and I had paid no attention to who had gone up or anything about that. I don't know how many had gone, one had gone, I was sure of that, but I don't know if any

(Testimony of John Baer.)

more or not. The meeting was rather broken up at that time, as I would say broken up, it wasn't orderly.

Q. Well, could you give us an estimate of how many had gone? A. No, I could not.

Q. But you were certain that you left within three or four minutes after Mr. Bodine left?

A. I know I left after him, yes.

Q. Did you see any of the other foremen leave before?

A. I'm not just sure, but I believe Mr. Mills left. They may have all left before I did—I wasn't paying particular attention to it.

Q. In other words you were—that is, so far as you know—you were the last foreman in attendance at the meeting?

A. As far as I know, I believe that is right. [705]

Q. What situation or what condition did you find at the plant when you went to the plant on the morning of June 11, 1937?

A. Well, there were very few men, generally the men stand or wait in front of the office for detailed information as to where they are to go unless they have been assigned previously as to where they were going or what they were to do, there were very few men there so immediately upon coming to the plant I went around the tunnel kiln to the burner's desk and the burner stated to me that he was going to leave at 7:30.

(Testimony of John Baer.)

Q. And which burner was that?

A. Art Hannum.

Q. At that time did you check over the charts and records relative to the kiln?

A. Yes, that is the first thing that I did.

Q. Were those charts in—were those charts and records in order? A. They were.

Q. They were satisfactory to you?

A. They were satisfactory, yes.

Q. Was anything out of order with the kiln at the time when [706] Mr. Hannum left?

A. No, everything was operating very nicely.

Q. Did you thank Mr. Hannum for remaining at the kiln? A. I did that.

Q. And you had no complaints regarding the condition of the kiln at the time when he left?

A. With the exception that he was leaving but I had no complaint relative to the condition of the kiln; he left before he was through with his shift, you see he wasn't through at 7:30, he wasn't through until 10:00 o'clock.

Q. But you have testified that you have been with the company for two years? A. Yes.

Q. How long had you had charge of the tunnel kiln?

A. Well, from the time—we started the construction and I was directly in charge of all the construction and under the engineer for the Harrop people.

Q. So that on the basis of your experience you should have been qualified to take over the kiln?

(Testimony of John Baer.)

A. Yes, sir. [707]

Q. I mean, you passed through the picket lines —did you pass through the picket lines a number of times during the course of the strike?

A. Yes, I did.

Q. Did you see Mr. Hannum, that is, Edward Hannum on the picket line at any time?

A. Yes.

Q. Did you ever speak to him there?

A. I spoke to everyone—I didn't make a point of not speaking to them, I should say, to qualify that.

Q. Did you see Mr. Bernard? A. Yes.

Q. Did you see Mr. Lucas? A. Yes.

Q. Did you see Mr. Ashworth?

A. Yes. [708]

Q. Entirely laborers; how many of the men under your supervision did you see at the meeting of June 1st, approximately?

A. Oh, well, I didn't make any effort to count them; in fact, I didn't go up to the front of the meeting; there were five or six, maybe eight or ten, rows of chairs toward the front; I imagine about twenty of them.

Q. You saw about twenty of them?

A. I imagine there was about that many. [712]

Redirect Examination

Q. (By Mr. Howlett): Mr. Baer, you stated that you had gone through the picket line on a number of occasions during the time the strike was on?

(Testimony of John Baer.)

A. Yes.

Q. I believe you testified that you saw some of the men there and spoke to some of them.

A. Yes, I have.

Q. Did you employ, after the strike, any men that you saw in the picket line?

A. Yes, we did.

Q. Can you name a few of them?

A. Yes, I can. There was the breaker in the shop, Chamberlain; one of the shop truckers, Chon Villa, Pete Bernard Jr., Paul Ortega, Joe Acosta, Sam Dabich, Chris Anaya—if you had a list or some way, I could tell you much better.

Q. I can show you a list here.

Trial Examiner Stephenson: Let the record show the witness is referring to Respondent's Exhibit 1.

A. (By the Witness) Fierro was one, Frank—

Mr. Mauritsen: Isn't this indicated on the exhibit? [713]

Mr. Howlett: That is true but not as to the testimony he is about to give. He has testified that some of the men were later rehired and some of them he remembers.

A. (By the Witness) (Continuing): Frank Castillo, Jose Acosta—I gave him before—Peter Bernard——

Trial Examiner Stephenson: Didn't you give him before?

(Testimony of John Baer.)

A. That is senior, the elder, there are two of them. Jesus Rios, Paddy (H. G.) Chamberlain—I gave him before. C. F. Anaya, Pete Bernard Jr.—I gave him before—F. Maldonardo, Simon Rios, Joe Acosta Jr., Paul Ortega, Chon Villa, Sam Dabich, Jose Arsiga, Pete Jiminez, Luie Juarez. Well, I believe that is all. I have gone through them hastily, but I have seen those men.

Recross Examination [714]

Q. Did I understand you to say that you knew that this Mr. Fuller was a member of the Union?

A. He told me he had signed a card; he told me that.

Q. Was that prior to the strike?

A. Prior to the strike. [718]

MARK C. DAMERON

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Howlett): State your name, please.

A. Mark Dameron.

Q. Mr. Dameron,where do you work?

A. L. A. Brick Company.

Q. How long have you been working there?

A. I believe I started working there in the latter part of March.

(Testimony of Mark C. Dameron.)

Q. Of what year? A. Of this year, '37.

Q. Were you working there on June 10, 1937, of this year?

A. Yes, I was working there until the picket line was around the place and when I seen the picket line I didn't go to work then.

Q. Didn't go through the picket line?

A. No, didn't go through the picket line.

Q. Did you join the Union referred to in these proceedings? [721]

A. Well, I signed an application card.

Q. Did you ever go in the picket line?

A. Yes.

Q. How many times?

A. Well—when I never had nothing else to do.

Q. When did you return to work at the L. A. Brick Company?

A. I couldn't say offhand but right around—oh, about a week after the Union kind of busted up.

Q. Did you authorize anyone to use your name as a complainant in this case? A. No.

Q. Do you recall that on or about the 17th day of July—withdraw that question—do you own an automobile? A. Yes, I have a car.

Q. Do you recall ever having any difficulty with the car on or about the 18th day of July, 1937?

A. I'm having difficulty all the time, yes.

Q. Well, did you have any particular difficulty about that time with gasoline?

Mr. Mauritsen: I object.

(Testimony of Mark C. Dameron.)

Trial Examiner Stephenson: Objection overruled.

A. (By the Witness): Well, I've run out of gasoline at one time there, yes, along about——

Q. (By Mr. Howlett) (Interrupting): When did that occur?

A. That has happened so many times.

Q. When did that occur—where did that occur? [722]

A. Well, at one time I left my place and I never got over a railroad track there and I couldn't get up over the grade on account of the shortage of gasoline.

Q. And what did you do?

A. I started down the highway to get gasoline.

Q. Did you meet anyone on the highway?

A. I walked just a few feet or so and Bill Ashworth came by.

Q. Was he driving?

A. In his car, it is a Buick sedan, I believe.

Q. How many people were there in that car?

A. Well, Bill and another kid, I don't know him.

Q. Do you know Glenn Stewart? A. Yes.

Q. Was Glenn Stewart in that car? A. No.

Q. Mr. Ashworth testified as follows; as to the statements made by you, he said:

"That Dameron told——"

Just a minute—"That you told him on this occasion and that Glenn Stewart was with him, that you had—that the reason you had not attended the meet-

(Testimony of Mark C. Dameron.)

ings of the Union was because of the fact that when you returned to work that you had positive instructions that at any time you were caught attending or having anything to do with the Union you would lose your [723] job."

Did you ever make a statement like that?

A. No.

Q. Did you ever make a statement similar to that? A. No. [724]

L. C. McNUTT

recalled as a witness by and on behalf of the National Labor Relations Board, having been previously duly sworn, was examined and further testified as follows:

Direct Examination

Q. (By Mr. Mauritsen): Mr. McNutt, you have the minutes of the union meetings with you at this time? [730]

A. I have part—most of them here up until June 15.

Q. Do you have the minutes of the meeting held June 15? A. Yes, sir.

Q. Will you read to the Examiner the minutes—

Mr. Howlett: Before you read those, Mr. Examiner, I would like to object to them on the ground that no foundation has been laid as to when these minutes were prepared.

(Testimony of L. C. McNutt.)

Trial Examiner Stephenson: I think probably you should lay more of a foundation, Mr. Mauritsen.

Q. (By Mr. Mauritsen): Mr. McNutt, what office do you hold in the union?

A. Secretary and treasurer.

Q. Do you prepare the minutes of the meetings held by the union? A. Yes, I do.

Q. Have you prepared all minutes of the meetings held up to June 15, 1937? A. Yes.

Q. That is, to and including that meeting?

A. Yes.

Q. How do you prepare the minutes of the meetings?

A. I write them down as things occur in the meeting and type them off later.

Q. And you have the typewritten minutes of the meetings with you? [731] A. Yes.

Q. Will you please read to the Examiner those minutes?

Mr. Howlett: May we have this off the record for a moment?

Trial Examiner Stephenson: Yes, certainly.

(Discussion off the record.)

Q. (By Mr. Mauritsen): When were these minutes prepared?

A. Notes were taken at the meeting of June 15 and typed probably the following day, I don't know exactly, I kept my work as I came to it up as fast as I could.

(Testimony of L. C. McNutt.)

Q. It was your usual procedure to take the notes and then type them up at your earliest convenience?

A. Surely, yes.

Q. Now, will you read to the Examiner the entry for the meeting of June 15, 1937?

A. The meeting of June 15, 1937:

"Meeting of June 15, 1937.

"Meeting called to order by President Hannum.

"A report was given on the meeting with Mr. Larson, Dr. Nylander and our committee.

"Minutes of the meeting of June 11 were read and accepted.

"The following committee for seniority rating was appointed: Paul Ortega, Tony Guerra and E. Solis.

"The following committee for relief was appointed: [732] William Ashworth, Ray Macht and Glenn Stewart.

"The committee for town support was appointed with M. J. Eaglin.

"A second demand for bargaining was submitted and accepted by the membership.

"Signed: L. C. McNUTT,
Secretary and Treasurer."

Q. At what time was this meeting held?

A. About 7:30 p. m., June 15.

Q. And when—do you recall approximately the time of the conference with Dr. Nylander?

(Testimony of L. C. McNutt.)

A. I believe it was 4:00 o'clock on that afternoon.

Q. Now, Mr. McNutt, I show you a copy of the Elsinore Leader Press. What is the date on that paper? A. Thursday, June 17, 1937.

Q. Now, will you read the first two paragraphs of this article?

Mr. Howlett: Are you finished with the question? I would like to see the paper. I may want to object to it.

(Passing document to counsel.)

Mr. Howlett: I will object to the reading into the record of the statement as shown in the paper, other than the facts that a meeting had been held that week.

Trial Examiner Stephenson: Is that the purpose of reading the article, Mr. Mauritsen, simply to fix the date? [733]

Mr. Mauritsen: Merely to fix the date.

Mr. Howlett: We do not object to having him read that portion of it, only that which indicates the meeting was held on that week and I am now referring to the paper of June 17.

Trial Examiner Stephenson: If the only purpose is to fix the date of the meeting I will overrule the objection.

Mr. Mauritsen: I desire at this time that the witness read the first two paragraphs because I think that they both pertain to that conference and will be read for the purpose of——

(Testimony of L. C. McNutt.)

Trial Examiner Stephenson (Interrupting): Let me see it. You may have the witness read those, the first two paragraphs, to fix the date.

Mr. Howlett: I would like to renew the objection on the ground that it is hearsay testimony.

Trial Examiner Kennedy: Objection overruled.

Q. (By Mr. Mauritsen): Now, Mr. McNutt, will you read the first two paragraphs of that article?

A. " 'I hope to be able to bring the C. I. O. group and the owners of the Los Angeles Brick Company plant at Alberhill together in a satisfactory agreement by the first part of next week,' predicted Towne Nylander, 21st Regional Director of the National Labor Relations Board, whose Federal Agency has played an important part in solving labor troubles extensively throughout the nation. 'A conference was held Tuesday of [734] this week between Mr. Gus Larson, of the Brick Company, and a committee of the Alberhill Workers, in my Los Angeles office, but no satisfactory agreement could be reached,' explained Nylander. 'We shall conduct conferences with the hope of clearing up this situation as rapidly as possible.' "

(Discussion off the record.) [735]

GLENN C. STEWART

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows: [741]

(Testimony of Glenn C. Stewart.)

Trial Examiner Stephenson: State your name?

The Witness: Glenn C. Stewart.

Trial Examiner Stephenson: How do you spell the last name?

The Witness: S-t-e-w-a-r-t.

Direct Examination

Q. (By Mr. Mauritsen): Mr. Stewart, have you ever worked for the respondent company?

A. L. A. Brick?

Q. Yes. A. Yes.

Q. When did you first start to work for the respondent?

A. I believe it was approximately December, around December 7, 1934.

Q. And what were your duties when you first started to work for the respondent?

A. I was kiln drawer at the time.

Q. And what rates did you receive for that work? A. 37½ cents per hour.

Q. What duties did you next perform for the respondent? A. Tractor driver.

Mr. Howlett: I didn't understand the answer, Mr. Reporter, will you read it please?

(The answer referred to was read by the reporter as above recorded.) [742]

(By Mr. Mauritsen): And what hourly wage did you receive for that work?

A. That was 37½ cents until a general raise of 2½ cents which came into effect and then I was receiving 40.

(Testimony of Glenn C. Stewart.)

Q. And what work were you doing when you last worked for the respondent?

A. I believe they describe that job as leverman on the steam press in the production of sewer pipe.

Q. And what wage did you receive while doing that work? A. 45 cents an hour.

Q. What wage were you last receiving—that is, did you receive 45 cents when you last worked for respondent?

A. I was receiving 52½ cents.

Q. Did you receive the general 2½ cent raise that was effective June 1, 1937? A. I did.

Q. Mr. Stewart, are you a member of the union?

A. I am.

Q. When did you first join the union, or when did you become a member?

A. I believe it was in June, around the 9th or 16th, somewhere about that.

Q. Were you present at the meeting at which the officers were elected? A. I was. [743]

Q. And you were there when Mr. Hannum and Mr. McNutt were elected as officers?

A. I was.

Q. Did you become a member of the union at that meeting? A. I did, yes.

Q. You signed a membership card? A. I did.

Q. Were you present at the meeting held June 9 when the demands of the union were considered by the union? A. Yes.

Q. And did you take part in the discussion?

A. I did.

(Testimony of Glenn C. Stewart.)

Q. In regard to yourself, what happened at that meeting?

A. I was appointed one of a committee to present the demands of our union to Arthur Bodine that following morning.

Q. Do you recall who the other members of that committee were?

A. Yes; C. W. Lucas and Luie Juarez, a Mexican.

Q. As a member of that committee did you present these demands to Mr. Bodine? A. I did.

Q. And what did Mr. Bodine say at that time?

A. He read them and studied them for awhile and said that he would present them to Mr. Gus Larson, the general manager, I judge; I guess it was, anyway. [744]

Q. Did you take part in the strike?

A. I did.

Q. Were you on the picket line? A. I was.

Q. Did you see the members of the—strike that—did you see the foremen going to and from the plant during the period of the strike? A. I did.

Q. Did you ever speak with any of them?

A. No.

Q. Did you ever say "Hello" or wave at them in any way? A. I didn't myself.

Q. Now, Mr. Stewart, I show you Board's Exhibit 3. What is the date on that exhibit?

A. June 16, 1937.

(Testimony of Glenn C. Stewart.)

Q. Were you present at the union meeting at which the drafting and sending of this letter was considered? A. Yes.

Q. Did you approve the sending of this letter by the union? A. I did.

Q. Mr. Stewart, I show you Board's Exhibit 4. Will you tell the Examiner whether your name appears on that list attached? A. It does.

Q. After the strike was called off, Mr. Stewart, did you apply for reinstatement? [745]

A. I did.

Q. What was the first occasion upon which you applied for reinstatement?

A. I don't quite get that.

Mr. Mauritsen: Read the question, Mr. Reporter.

(The question referred to was read by the reporter as above recorded.)

The Witness: The date?

Q. (By Mr. Mauritsen): Yes.

A. Well, I wouldn't know exactly the date; it was on the day the strike was called off. I and two others went in to ask for our jobs back.

Q. To whom did you apply?

A. Arthur Bodine.

Q. And what did he say to you at that time?

A. He waved his hands in this manner (indicating), told us that we got off on the wrong foot, then proceeded to tell of his family, supposedly you would think it was pertaining to some union, prob-

(Testimony of Glenn C. Stewart.)
ably he had gotten into earlier in life, or something to that effect.

Mr. Howlett: Just a minute, I can't understand that witness. Mr. Reporter, will you please read that last answer?

(The answer referred to was read by the reporter as above recorded.)

Q. (By Mr. Mauritsen): Well, he told you that you got off [746] on the wrong foot? A. Yes.

Q. In your opinion to what did he refer?

Mr. Howlett: Object to that as calling for the opinion of the witness.

Trial Examiner Stephenson: He may state what understanding he had.

The Witness: The union.

Q. (By Mr. Mauritsen): Did you make any subsequent request for reinstatement?

A. You mean reply?

Q. Yes. A. No.

Q. Did you ever ask for a letter of recommendation? A. I did.

Q. To whom did you apply?

A. Arthur Bodine.

Q. What did he say to you at that time?

A. He would not issue—he had orders not to issue any recommendations to strikers but to ones who were laid off he was authorized to give recommendations for reinstatement elsewhere.

Q. Did you stay out on strike on June 11?

A. I did.

(Testimony of Glenn C. Stewart.)

Q. Do you recall the approximate date of the application [747] for a letter of recommendation?

A. I can't recall exactly but I should judge it was two days after the strike was called off.

Q. Well, that would be then on or about the 27th of June, would it not?

A. I should judge so, yes. [748]

Cross Examination

Q. (By Mr. Howlett): Mr. Stewart, you state that you were employed in December of 1934?

A. Yes.

Q. That could have been on December 11?

A. Possibly, yes.

Q. In other words, it was around that date?

A. Around that, I don't know exactly.

Q. And your first work was a kiln drawer?

A. Right.

Q. That is in the nature of labor work, is it not?

A. Well, from what I understood it was skilled labor.

Q. Well, what does it consist of?

A. Drawing sewer pipe out of the kiln.

Q. You picked them up and drew them out?

A. Yes, and put them on a car.

Q. Put them on a car, that is what it consists of?

A. Careful handling.

Q. In other words, careful not to drop them, is that correct? A. Yes.

Q. So that it consists of lifting this pipe out of the [759] kilns and on to a car? A. Yes.

(Testimony of Glenn C. Stewart.)

Q. And your next job was a tractor driver?

A. Yes.

Q. How long did you work as a tractor driver?

A. About 8 months, I should judge.

Q. How long did you work as a kiln drawer?

A. A little better than a year, I believe.

Q. And the balance of the time you worked as a leverman on the steam press? A. Yes.

Q. Did you have any arguments with your fellow men while you were working on any of these jobs? A. None that I recall.

Q. You don't recall of any difficulties that you had with any of them? A. No.

Q. You would know if you did have them?

A. Yes.

Q. And you joined the union about when?

A. I thought on the 9th, but I believe that it was sooner than that according to the records.

Q. Well, if you wish to think the matter over and give us an opinion as to when you joined I will be glad to hear that.

A. I believe it was—definitely, I think it was on the [760] 5th.

Q. On the 5th? A. Yes.

Q. And that was at a meeting?

A. That was held at Elsinore.

Q. I mean, you joined at a meeting, during a meeting? A. Yes.

Q. And the meeting was held at Elsinore?

A. Yes, at Townsend Hall, I believe it was.

(Testimony of Glenn C. Stewart.)

Q. How many meetings did you attend?

A. Five—six.

Q. When was the first meeting you attended?

A. The day I joined, I believe, it was on the 5th.

Q. And you testified that you attended a meeting the 9th and took part in a discussion?

A. Right.

Q. What was the discussion at that time?

A. Just what do you mean?

Mr. Howlett: Mr. Reporter, will you please read the question?

(The question referred to was read by the reporter as above recorded.)

Mr. Mauritsen: Mr. Examiner, I believe the witness asked counsel what he meant by the question.

Mr. Howlett: He said he took part in some of the dis- [761] cussions and I wanted to know what the conversation was, between whom and what did you say?

Mr. Mauritsen: I object to it on the ground it is immaterial.

Trial Examiner Stephenson: Objection overruled.

What was the subject of the discussion, what did they talk about?

The Witness: At the time that I joined, that first meeting, as he says——

Mr. Howlett: Just a minute, so you won't be confused, I am speaking of the meeting of June 9.

(Testimony of Glenn C. Stewart.)

The Witness: Oh, we were discussing demands of the union. [762]

Q. Well, for your information this exhibit, now referring to Board's Exhibit 2, does not say that you will strike on June 11, but was that your intention to do that if the employer did not meet your demands? A. That was the intention, yes.

Q. Have you read that statement referred to as Board's Exhibit 2, the demand which you presented? A. Yes.

Q. Would you like to refresh your memory by looking at it again? A. Yes.

(Counsel hands witness document.)

Q. Did you help draft this document that I refer to? [764] A. By vote we did.

Q. By vote?

A. It was discussed and then by vote.

Q. But you had nothing to do with the drafting of it?

Trial Examiner Stephenson: He means the writing of it.

The Witness: No, at the time I didn't.

Q. (By Mr. Howlett): After reading this, does that express the opinion that you arrived at by the members at that time? A. Yes.

Q. Do you read it here that there is to be a strike? A. Yes.

Q. That is what you get from that document?

A. Yes.

Q. Do you find anything in there about that?

(Testimony of Glenn C. Stewart.)

A. I beg your pardon.

Q. Do you find anything in this document that there will be a strike unless the demands are met at that time?

A. It doesn't *there* that there will be a strike as an alternative.

Q. But you had in mind if they were not met by midnight of June 10, 1937, that a strike would be called the following day?

A. By unanimous vote it was, yes.

Q. And you delivered this to Mr. Bodine at what time on June 10? [765]

A. 7:15, I believe, in the morning, a. m.

Q. And where?

A. At the plant, at Alberhill.

Q. And what did Mr. Bodine tell you at that time?

A. He read it over carefully and took his time and said he would present it to Gus Larson when he arrived there at that specified time; but he couldn't do a thing about it. He said, "It reads all right."

Q. And you had no reply from that by midnight of June 10? A. We did not.

Q. And you went out on strike the following day? A. Yes. [766]

Q. When did you first apply for reinstatement?

Trial Examiner Stephenson: Do you understand the question? Perhaps, Mr. Reporter, you had better read it to him.

(Testimony of Glenn C. Stewart.)

(The question referred to was read by the reporter as above recorded.)

The Witness: In the month of June.

Q. (By Mr. Howlett): That was at the time the strike was called off? A. The following day.

Q. To whom did you apply?

A. Arthur Bodine.

Q. Who was present at the time you made that application?

A. Bob Neblett, the timekeeper.

Trial Examiner Stephenson: Frank whom?

The Witness: Bob Neblett; and Jack Anderson, Arthur [767] Bodine and Sam Dabich and Roy Osborne and myself.

Q. (By Mr. Howlett): And that took place where with reference to the Alberhill Plant?

A. In the office of the Alberhill Plant.

Q. And on direct examination you testified that Mr. Bodine made a statement to you. I would like to have you repeat that statement as nearly as possible in the words that he used.

A. Well, when we approached him for reinstatement, he waved his hands in this manner (indicating) meaning, "No," I presume, and proceeded to tell us that we got off on the wrong foot, pertaining, I should judge, to our union.

Q. He didn't refer to the union but you assumed that? A. Not at the time.

Q. Well, go ahead and tell us what else he said, if anything.

(Testimony of Glenn C. Stewart.)

A. He proceeded to tell us of his family and I presumed then——

Q. (Interrupting): Can you tell it in the words that he used, that is what I am trying to get at?

A. That is the nearest I can give you on words, the exact words he was saying. He was telling about his family as coming first against anything that comes up like that, meaning, I guess, to unions and shut-outs and so on, and finally said that there would be no chance. [768]

Q. Is that all the conversation that took place?

A. For Sam Dabich and I, yes, we went right out shortly after that.

Q. And that conversation was directed to you and who else?

A. Roy Osborne and Sam Dabich. [769]

Q. Did Mr. Damron ever tell you any other reason of not attending a meeting? A. No.

Q. Did you have a conversation with Mr. Damron on the road near Alberhill? A. Not me.

Q. Did you ever have a conversation near Elsinore when you were riding in a car with Mr. Ashworth?

A. I had a conversation with him, but——

Q. With whom?

A. Nothing much, William Ashworth——

Q. Well, was Mr. Damron there?

A. He was.

Q. And when was that?

(Testimony of Glenn C. Stewart.)

A. I don't know whether it was—it might have been that same night, I don't know, we was pushing him to a service station as far as I can recall.

Q. What conversation did you have at that time?

A. I didn't pay much attention. [774]

Q. Who was in that car at that time?

A. Ashworth, William Ashworth, myself, and his boy and Mark Damron.

Q. Do you know where they picked them up?

A. I don't know exactly.

Q. Was there any conversation about the L. A. Brick Company at that time you were together in that car? A. Between me and Bill Ashworth?

Q. That you overheard Damron make.

A. I can't recall it, I may not have been paying any attention to it at the time.

Q. But so far as you know, you can't remember any statements made by other parties while you were in that car. What part of the car did you sit in?

A. In the back.

Q. Where did Damron sit? A. In the front.

Q. And were you conversing about other subjects?

A. No, I was—myself, I was just listening mostly.

Q. But you didn't hear anything?

A. Well, I guess I did but I didn't pay much attention.

(Testimony of Glenn C. Stewart.)

Q. I don't mean to confuse you but I mean you didn't hear anything about the subject that I am talking about?

A. Not that I can recall. [775]

Mr. Mauritsen: Mr. Examiner, at this time, I should like to introduce as part of Board's Exhibit No. 1, the order appointing the Trial Examiner in this case. I believe that a place has been reserved either as "1" or some similar designation.

Trial Examiner Stephenson: Any objection, gentlemen?

Mr. Howlett: No objection. [788]

Trial Examiner Stephenson: If not, it will be received and marked as part of Exhibit 1, Board's Exhibit 1.

(Thereupon the document above referred to was received in evidence and marked as part of Board's Exhibit No. 1.) [789]

Trial Examiner Stephenson: Respondent offers the following stipulation:

Be it stipulated that all testimony and evidence introduced on behalf of Respondent upon the issue of jurisdiction as joined in the complaint and answer filed herein marked respectively Board's Exhibit 1c and 1m, be deemed and considered for all purposes as having been introduced by Respondent in support of its special Appearance and Motion to

Dismiss for lack of jurisdiction heretofore filed herein, marked Board's Exhibit 1 (1), to the same extent and with the same force and effect as if such evidence and testimony had been separately and regularly offered and introduced on behalf of Respondent company in support of such Motion to Dismiss; and that all testimony and evidence introduced on behalf of the Board upon the issue of jurisdiction as joined in said complaint and answer be deemed and considered for all purposes as having been introduced in contravention of said Special Appearance and Motion to Dismiss for lack of jurisdiction, to the same extent and with the same force and effect as if such testimony and evidence had been separately and regularly offered and introduced on behalf of the Board in contravention of said Motion to Dismiss, and

Be it further stipulated that said Motion to Dismiss for [794] lack of jurisdiction may be submitted for decision upon the proofs so adduced as hereinbefore in this stipulation referred to.

Is that stipulated by the Board?

Mr. Walsh: That is agreeable to the Board.

Trial Examiner Stephenson: Respondent offers as Exhibit No. 5 a statement showing the kinds and quantities and value of sales for 1936-1937.

Any objection on behalf of the Board?

Mr. Walsh: No objection.

Trial Examiner Stephenson: The same will be received as Respondent's Exhibit No. 5.

(The document above referred to was received in evidence and marked as Respondent's Exhibit No. 5.)

RESPONDENT'S EXHIBIT NO. 5

KINDS, QUANTITIES & VALUE OF SALES—1936, 1937

(Note: 1936 sales complete, 1937 sales Jan. to Nov. Incl.)

	1936		1937	
Product	**Tons**	**Amount**	**Tons**	**Amount**
Common Brick	381.86	1,558.18	662.81	4,429.94
Fire Brick	3,567.03	57,096.73	3,382.40	61,127.55
Fire Clay & Grog	188.56	2,657.40	177.81	2,602.95
Face Brick	2,164.33	33,773.73	2,224.92	37,212.00
Old Gold & Grey	122.45	1,634.23	46.98	781.28
Sewer Pipe	7,466.73	181,679.66	7,178.60	174,143.75
Flue Lining	1,044.29	43,254.59	947.54	38,150.94
Roof Tile	6,870.31	112,010.89	4,052.21	85,699.86
Hollow Tile	2,023.85	21,348.93	2,085.44	22,763.71
Quarry Tile	353.98	7,520.52	275.23	7,071.70
Padre Tile	6.02	201.90	11.31	357.00
Drain Tile	462.70	7,210.74	294.49	4,568.08
	24,552.11T	$469,947.50	21,339.74T	$438,908.76
Material Purchased within State of California—for Resale		25,965.21		24,763.04
Sales Tax		5,466.91		5,185.84
Total Gross Sales		$501,379.62		$468,857.64

[Endorsed]: 1-10-38. Respondent's Exhibit No. 5.

Trial Examiner Stephenson: Respondent now offers as Exhibit No. 6 a statement of value of sales of all products [795] delivered by the company to *desginations* outside the State of California in 1936.

Any objection, gentlemen?

Mr. Walsh: No objection.

Trial Examiner Stephenson: The same will be received and marked as Respondent's Exhibit No. 6.

(The document above referred to was received in evidence and marked as Respondent's Exhibit No. 6.)

RESPONDENT'S EXHIBIT NO. 6

VALUE OF SALES OF ALL PRODUCTS DELIVERED BY COMPANY TO DESTINATIONS OUTSIDE STATE OF CALIFORNIA IN 1936.

Alexander & Baldwin, Ltd.		
January	152.10	
August	727.98	
September	979.04	
		1,859.12
Bowdish & Bollinger		
May	1,331.16	
June	1,364.00	
July	905.20	
August	954.80	
		4,555.16
Grand Canyon Lime & Cement Co.		
May	705.74	
		705.74
Harry Haver		
January	86.76	
March	451.72	
April	821.50	
		1,359.98
Honolulu Iron Works Co.		
January	2,465.23	
February	858.91	
June	406.29	
September	424.52	
October	4,129.39	
		8,284.34

Republic of Mexico		
July	5,995.92	
		5,995.92
Mutual Coal & Lumber Co.		
July	1,925.40	
September	667.95	
November	892.65	
		3,486.00
Superior Lumber Co.		
July	680.90	
		680.90
		$26,927.16

[Endorsed]: 1-10-38. Respondent's Exhibit No. 6.

RESPONDENT'S EXHIBIT NO. 7

VALUE OF SALES OF ALL PRODUCTS DELIVERED BY COMPANY TO DESTINATIONS OUTSIDE STATE OF CALIFORNIA IN 1937—JANUARY TO NOVEMBER INCLU.

Alexander & Baldwin, Ltd.		
February	9.25	
March	1,535.82	
August	282.75	
November	1,023.80	
		2,851.62
Boulder City Builders Supply		
August	504.00	
		504.00
Theo. H. Davis & Co.		
March	498.19	
July	115.90	
September	542.35	
		1,156.44

Grand Canyon Lime Co.		
March	819.96	
August	1,038.71	
		1,858.67
Harry Haver		
August	1,343.49	
		1,343.49
Hayward Lumber Co.		
November	9.10	
		9.10
Honolulu Iron Works Co.		
February	1,563.61	
March	13,156.85	
April	1,438.07	
May	1,926.85	
June	3,342.15	
July	1,146.80	
August	239.84	
September	86.50	
October	70.01	
		22,970.68
Northern Arizona Society		
July	713.05	
October	6.69	
		719.74
Woitishek Lumber Co.		
January	736.22	
		736.22
		$32,149.96

[Endorsed]: 1-10-38. Respondent's Exhibit No. 7.

Mr. Walsh: I would like to offer as Board's Exhibit No. 11, to be treated in the same manner as you did the others. Mr. Howlett wants to object to that.

Trial Examiner Stephenson: The Board offers as its Exhibit No. 11 a statement of products sold and delivered in this State in the year 1936. Intention of the [796] purchaser to ship out of State indicated, but actual destination unknown.

Any objection, gentlemen?

Mr. Howlett: Yes. We wish to object upon the ground the same is incompetent, irrelevant, and immaterial, and does not tend to prove or disprove that the goods were carried in interstate commerce.

Trial Examiner Stephenson: The objection is overruled. The same will be received and marked as Board's Exhibit No. 11.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 11.)

BOARD'S EXHIBIT NO. 11

PRODUCTS SOLD AND DELIVERED IN THIS STATE YEAR 1936—INTENTION OF PURCHASER TO SHIP OUT OF STATE INDICATED, BUT ACTUAL DESTINATION UNKNOWN.

Alexander & Baldwin, Ltd.

January	275.76	
February	1,277.10	
March	252.00	
April	464.40	
June	639.00	
August	99.60	
		3,007.86

T. A. Allen Construction Co.		
March	51.47	
April	139.77	
		191.24
Baker Thomas Lime & Cement		
January	103.60	
February	102.03	
March	23.10	
May	195.32	
June	137.04	
July	7.32	
September	248.55	
October	1,005.69	
December	450.14	
		2,272.79
Frank Beam Lumber Co.		
January	41.50	
April	7.64	
July	48.94	
November	172.71	
		270.79
Bowdish & Bollinger	57.70	
		57.70
Douglas Hardware Co.		
March	17.38	
		17.38
Caliente Rapid Transit		
October	41.66	
		41.66
Walter Dubree		
January	281.88	
February	597.58	
March	110.20	
April	189.77	

May	318.15	
June	214.72	
July	411.03	
August	344.62	
September	263.01	
October	550.33	
November	670.57	
December	227.44	
		4,179.30
Evans Construction Co.		
December	799.78	
		799.78
Head Lumber Co.		
April	190.45	
October	202.08	
		392.53
Honolulu Iron Works Company		
January	198.22	
February	834.37	
March	55.44	
April	42.75	
May	98.68	
June	92.71	
July	1,007.91	
August	1,115.63	
September	369.97	
October	504.00	
		4,319.68
Howe Bros.		
April	137.58	
May	66.50	
		204.08
Marquis Smelting & Mining Co.		
February	185.00	
		185.00

Wm. P. Neil		
April	70.17	
May	93.60	
		163.77
Robert Nicolai		
January	369.90	
February	45.00	
March	381.00	
April	312.66	
June	238.55	
July	42.00	
October	323.96	
November	14.06	
		1,727.13
O. K. Plumbing & Supply Co.		
October	51.18	
December	18.00	
		69.18
O'Malley Lumber Co.		
January	30.10	
February	20.71	
March	103.43	
April	52.94	
May	16.32	
June	31.20	
July	40.41	
August	35.36	
September	174.99	
		505.46
Sigfried Olsen Shipping Co.		
May	3,124.85	
		3,124.85

Phoenix Roofing & Supply Co.		
January	577.18	
March	1,308.68	
April	159.60	
May	959.03	
June	818.80	
July	773.34	
August	787.02	
September	825.80	
November	949.12	
December	580.01	
		7,738.58
Prescott Lumber Co.		
June	78.75	
		78.75
A. Steinfeld Co.		
January	142.74	
March	110.94	
April	224.76	
June	81.47	
July	84.20	
August	141.36	
September	12.00	
October	398.88	
December	30.11	
		1,226.46
United States Government		
January	129.33	
March	115.44	
		244.77
Woitishek Lumber Co.		
March	24.30	
September	7.37	
October	137.48	
		169.15

Yuma Lumber Co.		
August	11.60	
September	28.70	
October	187.40	
November	252.22	
December	19.52	
		499.44
		$31,486.63

[Endorsed]: 1-10-38. Board's Exhibit No. 11.

Mr. Walsh: Just one question: Mr. Howlett, your objection does not go to the correctness of the amounts set forth in the exhibit?

Mr. Howlett: No, it does not.

Trial Examiner Stephenson: You stipulate that the amounts set forth in the statement are correct?

Mr. Howlett: I do.

Mr. Walsh: Board's Exhibit No. 12 will be the same subject for the year 1937.

Trial Examiner Stephenson: The Board offers a statement of products that the Respondent sold and delivered in this State in the year 1937, January to November, inclusive. [797] Intention of purchaser to ship out of State indicated, but actual destination unknown.

Mr. Howlett: The same objection, and the same admission as to the correctness of the figures as was given to the introduction of Exhibit No. 11.

Trial Examiner Stephenson: The objection is overruled. The document will be received and marked as Board's Exhibit No. 12.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 12.)

BOARD'S EXHIBIT NO. 12

PRODUCTS SOLD AND DELIVERED IN THIS STATE YEAR 1937 JANUARY TO NOVEMBER INCLUSIVE—INTENTION OF PURCHASER TO SHIP OUT OF STATE INDICATED, BUT ACTUAL DESTINATION UNKNOWN.

Alexander & Baldwin, Ltd.		
February	753.00	
March	1,019.74	
April	541.41	
June	105.30	
August	613.22	
September	95.31	
		$3,127.98
Baker Thomas Lime Co.		
March	1,325.41	
May	582.66	
June	289.68	
August	676.00	
September	718.18	
October	140.80	
November	667.72	
		4,400.45
Babbitt Bros. Trading Co.		
October	19.50	
May	3.51	
August	7.80	
		30.81

Boulder City Builders Supply		
March	11.82	
July	68.59	
		80.41
Frank Beam Lumber Co.		
September	43.72	
November	28.52	
		72.24
Walter Dubree		
January	731.28	
March	66.70	
April	10.40	
June	682.03	
September	155.63	
		1,646.04
Evans Construction Co.		
March	46.39	
		46.39
Foxworth Killen Lumber Co.		
June	89.50	
		89.50
De Camp Hudson Co.		
April	10.82	
		10.82
Honolulu Iron Works		
February	427.96	
March	2,547.19	
April	2,075.62	
May	430.56	
June	82.90	
July	1,262.13	
August	118.49	
September	10.96	
November	145.91	
		7,101.72

A. R. Losh Co.		
March	663.00	
		663.00
Momsen, Dunnegan Ryan Co.		
August	676.77	
		676.77
Robert Nicolai		
January	333.82	
July	378.15	
October	33.00	
		744.97
Wm. P. Neil		
May	93.60	
		93.60
O. K. Plumbing Supply Co.		
February	290.56	
March	246.60	
August	584.68	
November	90.33	
		1,212.17
Sigfried Olsen Shipping Co.		
March	4,853.46	
July	655.20	
August	1,570.83	
September	920.06	
		7,999.55
O'Malley Lumber Co.		
January	133.37	
June	100.80	
		234.17
Pacific Clay Products		
May	965.49	
		965.49

Phoenix Roofing & Supply Co.		
February	1,016.33	
March	631.60	
April	542.07	
May	1,197.03	
June	1,536.40	
July	2,076.50	
September	644.78	
November	809.63	
		8,454.34
Steinfeld Company		
January	513.18	
April	50.45	
May	245.87	
July	309.15	
November	315.06	
		1,433.71
United States Government	363.92	
		363.92
Woitishek Lumber Co.		
January	10.28	
October	8.10	
		18.38
Whiting Brothers Co.		
September	126.00	
		126.00
Yuma Lumber Co.		
February	56.50	
March	41.99	
April	16.05	
May	3.00	
June	59.50	
September	28.35	
October	31.78	
November	35.70	
		272.87

Union Tile Co.		
June	452.05	
July	547.89	
		999.94
		$40,771.64

[Endorsed]: 1-10-38. Board's Exhibit No. 12.

Mr. Walsh: Exhibit No. 13, products sold and delivered to railroads.

Trial Examiner Stephenson: The Board offers as its Exhibit 13 a statement of products sold and delivered to railroads in the State for delivery by railroads to points within the State of California for the year 1936 and 1937, from January to November, inclusive. Any objection?

Mr. Howlett: No objection.

Trial Examiner Stephenson: The same will be received and marked as Board's Exhibit No. 13.

BOARD'S EXHIBIT NO. 13

PRODUCTS SOLD AND DELIVERED TO RAILROADS IN THIS STATE FOR DELIVERY BY RAILROADS TO POINTS WITHIN THE STATE OF CALIFORNIA FOR THE YEAR 1936, AND 1937 FROM JANUARY TO NOVEMBER, INCLUSIVE.

Destination California

	Atchison, Topeka & Santa Fe R. R. Co.		Southern Pacific Company	
1936				
February	$29.06		None	
June	35.48			
September	362.27			
		$426.81		
1937				
January	10.01		440.33	
March	10.01		278.10	
April	32.08			
June	281.69			
August	21.21			
November	28.89			
		$383.89		$718.43

No sales in months not indicated.

[Endorsed]: 1-10-38. Board's Exhibit No. 13.

Mr. Walsh: Board's Exhibit 14.

Trial Examiner Stephenson: The Board now offers as its Exhibit 14 a statement of products sold and delivered to the [798] railroads in this state for the years 1936 and 1937, from January to Novem-

ber, inclusive. Intention of railroad to ship out of state indicated, but actual destination unknown.

Any objection?

Mr. Howlett: The same objection as to Board's Exhibit No. 11 and Board's Exhibit No. 12, with the same admission that the figures therein used are correct.

Trial Examiner Stephenson: Objection overruled. The same will be received and marked as Board's Exhibit 14.

Mr. Walsh: Exhibit 15 is a list of machinery purchased in the year 1936 and in the year 1937.

Trial Examiner Stephenson: The Board offers as its Exhibit 15 a statement of machinery purchased outside the State by the Respondent for the years 1936 and 1937, up to and including November. Is that right?

Mr. Howlett: Yes.

Trial Examiner Stephenson: Of the latter year. Any objection?

Mr. Howlett: The same objection as made to the various other exhibits, and in addition thereto a special objection as to the fifth item, the Harrup Ceramic Company of Columbus, Ohio, of $1,080, and the same company in 1937 of $720, as these are not machinery items. They are plans and permissions to build certain machinery and equipment.

Trial Examiner Stephenson: You admit, however, that the [799] facts contained in the statement are true?

Mr. Howlett: Yes. We ask to have those two items stricken from the exhibit.

Trial Examiner Stephenson: Objection overruled, and the request is denied. The same will be received and marked as Board's Exhibit 15.

(Thereupon the documents above referred to were received in evidence and marked as Board's Exhibits Nos. 14 and 15, respectively.)

BOARD'S EXHIBIT NO. 14

PRODUCTS SOLD AND DELIVERED TO RAILROADS IN THIS STATE FOR THE YEAR 1936, AND 1937 FROM JANUARY TO NOVEMBER, INCLUSIVE—INTENTION OF RAILROAD TO SHIP OUT OF STATE INDICATED BUT ACTUAL DESTINATION UNKNOWN.

1936

	Atchison, Topeka & Santa Fe R. R. Co.	Southern Pacific Co.
January	17.56	463.50
February		463.50
March	47.94	
April	27.04	
May	22.35	
June	73.63	
July		95.02
August	41.82	
September	11.18	231.75
October		887.71
November	27.04	
	$268.56	$2,141.48

1937		
February		1,173.11
April	23.26	633.20
May	38.63	1,350.30
June	56.31	2,700.85
July		2,863.60
August		2,249.30
September		653.77
October	30.64	1,575.79
November	78.59	
	$227.43	$13,199.92

No sales in months not indicated.

[Endorsed]: 1-10-38. Board's Exhibit No. 14.

Mr. Walsh: Board's Exhibit No. 16 is a list of truck carriers used by Respondent, and Board's Exhibit 17 is a list of railroad carriers used by Respondent.

Trial Examiner Stephenson: The Board offers as its Exhibit 16 a list of truck carriers used by the Respondent. Any objection?

Mr. Howlett: No objection.

Trial Examiner Stephenson: The same will be received and marked as Board's Exhibit 16.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 16.)

Trial Examiner Stephenson: The Board also offers as its Exhibit No. 17 a list of railroads used by the Respondent as carriers.

Any objection, Mr. Howlett? [800]

Mr. Howlett: No objection.

Trial Examiner Stephenson: The same will be received and marked as Board's Exhibit No. 17.

(Thereupon the document above referred to was received in evidence and marked as Board's Exhibit No. 17.)

BOARD'S EXHIBIT NO. 17

Railroads Used As Carriers

Atchison, Topeka & Santa Fe Railway Co.
Southern Pacific Company
Union Pacific Railroad Company
Pacific Electric Railway Company

[Endorsed]: 1-10-38. Board's Exhibit No. 17.

Mr. Walsh: Mr. Examiner, I would like to ask for a stipulation of counsel an offer of stipulation. The Board will stipulate as to the correctness of the figures contained in Respondent's Exhibits 5, 6 and 7, and will stipulate that those are the figures that would be testified to if witnesses were called and examined from the books and records of the company.

I will ask counsel to stipulate with me that the figures contained in Exhibits 11 to 15 are the correct figures, and that it would be so testified if witnesses were called and examined.

Mr. Howlett: It will be so stipulated. [801]

Trial Examiner Stephenson: Very well. Upon motion of the Board the complaint will be dismissed without prejudice as to Charles Bland. [802]

Mr. Walsh: The Board rests.

Trial Examiner Stephenson: Off the record.

(Remarks outside the record.)

Mr. Mauritsen: Mr. Examiner, since a number of the persons named in the complaint are not available and we have been unable to get in touch with them and to obtain their testimony for the hearing, the Board now moves at this time to dismiss without prejudice the following persons named in Appendix A:

C. W. Starr
Albert (Slim) Davis
Charles Willard
Claude Pearl

And the following persons named in Appendix B:
Raymond Macht
Kenneth Norris
Nils Martinson
Juan Romero
Ernest Sill, and
Mark Damron.

Mr. Howlett: If your Honor please, before you rule on that motion, we wish to object to the dismissal without prejudice of these various individuals. The case has been brought, has been pending here for several weeks. There is no showing what effort, if any, has been made to secure the [803] witnesses in this case. The case is being conducted at large expense to the employer. We believe we should have one trial and finish all of the matters.

On that ground we object to the dismissal without prejudice.

Trial Examiner Stephenson: Objection overruled. The motion is granted.

HENRY PRESSING

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: Henry Pressing; P-r-e-s-s-i-n-g.

Direct Examination

Q. (By Mr. Howlett): What is your occupation, Mr. Pressing?

A. Secretary, L. A. Brick and Clay Products Company.

Q. How long have you been so employed?

A. Since February 15, 1920.

Q. As such, are you in charge of the financial records and books of the company?

A. I am. [804]

Q. Do you know whether or not your company publishes or distributes any advertising or circulars —strike that.

Do you know whether your company published or distributed any advertisements or circulars during the year 1936 or '37? A. They did not.

Q. Has your company ever registered a trade mark with the United States Patent Office?

(Testimony of Henry Pressing.)

A. No.

Q. Has your company ever registered with the Federal Securities and Exchange Commission?

A. No.

Q. Has your company ever registered under the Federal Motor Carriers Act of 1935? A. No.

Q. Were any raw materials shipped to your company from outside the State of California during the years 1936 and '37? A. No.

Q. Did your company ship any raw materials from California to points outside the State of California during the year 1936-1937? A. No.

Q. Are you familiar with the kinds and sources of materials used by your company in its operations? A. Yes.

Q. Particularly referring to 1936 and 1937? [805]

A. Yes.

Q. What are the products used in the manufacture of clay products?

A. Raw clay, water, barium, and various chemicals for coloring.

Q. Where is clay produced?

A. Salt. Clay is produced at Alberhill.

Q. Does your entire supply come from that point? A. It does.

Q. And that is Riverside, California?

A. Yes.

Q. Where does your water come from?

A. Alberhill.

(Testimony of Henry Pressing.)

Q. Riverside, California?

A. Riverside County.

Q. Where do you secure your barium from?

A. The Los Angeles Chemical Company, a local organization.

Q. Where are they located?

A. In Los Angeles.

Q. Are there any other products that go into your manufacture? A. Salt.

Q. Where do you secure your salt?

A. From the California Rock Salt Company.

Q. Where are they located?

A. They are located in California. [806]

Q. The chemicals that you speak of, where are they secured?

A. From the Los Angeles Chemical Company.

Q. Do you purchase any of your products outside the State of California that go into the manufacture of your clay products? A. No.

Q. Referring to Respondent's Exhibit No. 5, do the sales shown in this exhibit include the sales of your company, whether made within the State of California, or made outside the State of California?

A. They do.

Q. In other words, it is your total sales?

A. Total sales; yes, sir.

Q. Why were your sales listed—referring again to Exhibits 6 and 7, those refer to sales that were made and delivered outside the State of California, is that correct? A. That's correct.

(Testimony of Henry Pressing.)

Q. Why were the sales listed there as being made outside the State of California?

A. Because the orders from the purchasers so required.

Q. The delivery of goods in those two exhibits was made outside the State of California, is that correct? A. That's right.

Q. Referring to Respondent's Exhibit 5 and Respondent's Exhibit 6 and Respondent's Exhibit 7, as to all sales listed on Exhibit 5, other than those in Exhibits 6 and 7, where was [807] delivery made? A. In California.

Q. Is there any particular reason why those sales were made and deliveries—withdraw that.

Is there any particular reason why deliveries were made in the State of California?

A. Because the orders requested that they be made at the point of destination within the State of California.

Q. As to all sales made by your company in which delivery is made within the State of California, does the company thereafter have any control over the destination of the goods as to delivery, or any responsibility for loss or damage to the goods? A. No.

Q. Do you pay, or are you required to pay the sales tax to the Board of Equalization of the State of California on the sales listed in Exhibits 6 and 7?

(Testimony of Henry Pressing.)

A. No. These shipments are made outside the State.

Q. Referring to Board's Exhibits 11 and 12, which are products sold and delivered in the State of California for the years 1936 and 1937, in which the intention of the purchaser to ship out of the State is indicated, but actual destination is unknown, do you, or are you required to pay sales tax to the State Board of Equalization of the State of California?

A. Yes; unless there is a certificate of resale furnished by [808] the purchaser.

Q. Well, as to the certificate of resale, that would apply to all cases? A. Yes.

Q. Whether sold in the State or out of the State. Do your records show the number of men employed, the production in tons, the inventory in tons, and the sales in tons for each month of the year of 1936, and from January to November of 1937, inclusive?

A. They do.

Q. I show you, Mr. Pressing, what purports to be such a record. Who prepared that record?

A. It was prepared under my supervision.

Q. From what figures were these figures taken?

A. From our books and records.

Q. And those figures are correct?

A. They are.

Mr. Howlett: I wish at this time to offer into evidence Respondent's Exhibit No. 8.

(Testimony of Henry Pressing.)

Trial Examiner Stephenson: You had better identify that, Mr. Howlett. It does not seem to be titled anything in particular, so that we will have it in the record.

Mr. Howlett: All right. It is a statement for 1936, and for the months of January to November, inclusive, 1937, showing the number of men, the production in tons, the inventory [809] in tons, and the sales in tons for each month.

Trial Examiner Stephenson: Any objection on the part of the Board?

Mr. Mauritsen: No objection.

Trial Examiner Stephenson: The same will be received in evidence and marked as Respondent's Exhibit No. 8.

(Thereupon the document above referred to was received in evidence and marked as Respondents' Exhibit No. 8.)

(Testimony of Henry Pressing.)

RESPONDENT'S EXHIBIT NO. 8

Los Angeles Brick & Clay Products Co.

Month	1936 (year complete)				1937 (Jan. to Nov. Incl.)			
	No. of Men	Prod. in Tons	Inv'ty Tons	Sales Tons	No. of Men	Prod. in Tons	Inv'ty Tons	Sales Tons
January	121	2178	23,929	2111	160	2162	21,902	1993
February	125	1856	24,181	1604	158	1876	21,689	2089
March	129	1961	23,676	2466	157	2087	20,757	3019
April	135	2375	23,548	2503	165	2811	21,127	2441
May	133	2630	23,916	2262	164	3239	22,238	2128
June	136	2309	24.315	1910	101	1303	21,691	1850
July	135	2138	24,460	1993	142	1669	21,651	1709
August	135	2266	24,877	1849	127	2671	22,390	1932
September	141	2135	25,148	1864	152	2704	23,534	1560
October	140	1937	24,909	2176	136	2142	24,260	1416
November	148	2400	25,263	2046	133	1739	24,796	1203
December	154	2021	25,560	1724				

Note: Sales tons—orders filled during month.

[Endorsed]: 1/10/38. Respondent's Exhibit No. 8.

(Testimony of Henry Pressing.)

Q. (By Mr. Howlett) At the bottom of the certificate, Mr. Pressing, there is a note reading: "Sales tons—orders filled during month." Will you be kind enough to explain what that means?

A. The sales by tons refers to deliveries by tons, not particularly the amount sold, but the deliveries in that particular month.

Q. Do the records of your company show the average number of men employed by months during the years from 1929 to 1937, inclusive?

A. They show the actual number of men.

Q. Have you prepared a statement taken from your records showing such facts?

A. I have.

Q. Is that a statement that you prepared?

A. Yes, sir. [810]

Q. Yes, sir.

Mr. Howlett: We wish at this time to introduce into evidence Respondent's Exhibit No. 9.

Trial Examiner Stephenson: Being the document about which you have just interrogated the witness?

Mr. Howlett: That is correct.

Trial Examiner Stephenson: Any objection on the part of the Board?

Mr. Mauritsen: Mr. Examiner, I have had no opportunity to go over either this exhibit or the previous one, and no copy has been furnished me. So I should like to reserve an objection until we have time to look them over.

(Testimony of Henry Pressing.)

Mr. Howlett: If your Honor please—I think most of the——

Trial Examiner Stephenson: Just a second. You will have an opportunity to examine this. The statement certainly is material. As to its correctness, of course, you will have an opportunity to go into the correctness of the statement. But it will be received and marked as Respondent's Exhibit No. 9.

(Thereupon the document above referred to was received in evidence and marked as Respondent's Exhibit No. 9.)

RESPONDENT'S EXHIBIT No. 9

Los Angeles Brick & Clay Products Co.

NUMBER OF MEN ON ALBERHILL PAYROLL

	1929	1930	1931	1932	1933	1934	1935	1936	1937
January	134	146	155	104	75	88	94	121	160
February	133	122	150	107	80	92	94	125	158
March	138	124	148	103	84	95	93	129	157
April	139	131	146	96	84	94	95	135	165
May	138	130	133	99	78	81	97	133	164
June	141	120	132	88	66	74	98	136	101
July	136	125	130	86	68	76	100	135	142
August	140	119	132	83	63	78	104	135	127
September	139	117	122	75	65	80	102	141	152
October	145	122	128	74	64	82	108	140	136
November	145	126	113	71	63	91	114	148	133
December	146	146	110	71	65	93	121	154	

[Endorsed]: 1/10/38. Respondent's Exhibit No. 9.

(Testimony of Henry Pressing.)

Q. (By Mr. Howlett) Mr. Pressing, I show you what purports to be an official pamphlet issued by the United States Department of Commerce on clay-products, including pottery, nonclay [811] refractories, and sand-lime brick, including production and stocks for the year 1936, dated August, 1937, and ask you whether the pamphlet is what it purports to be. A. Yes, it is.

Mr. Howlett: We wish to introduce that as Respondent's Exhibit No. 10.

Trial Examiner Stephenson: Any objection on the part of the Board?

Mr. Mauritsen: No objection.

Trial Examiner Stephenson: The same will be received in evidence as Respondent's Exhibit No. 10.

(Thereupon the document above referred to was received in evidence and marked as Respondent's Exhibit No. 10.)

U. S. DEPARTMENT OF COMMERCE
Daniel C. Roper, Secretary
BUREAU OF THE CENSUS
William L. Austin, Director

Respondent's Exhibit
No. 10

CLAY-PRODUCTS (INCLUDING POTTERY)

NONCLAY REFRACTORIES

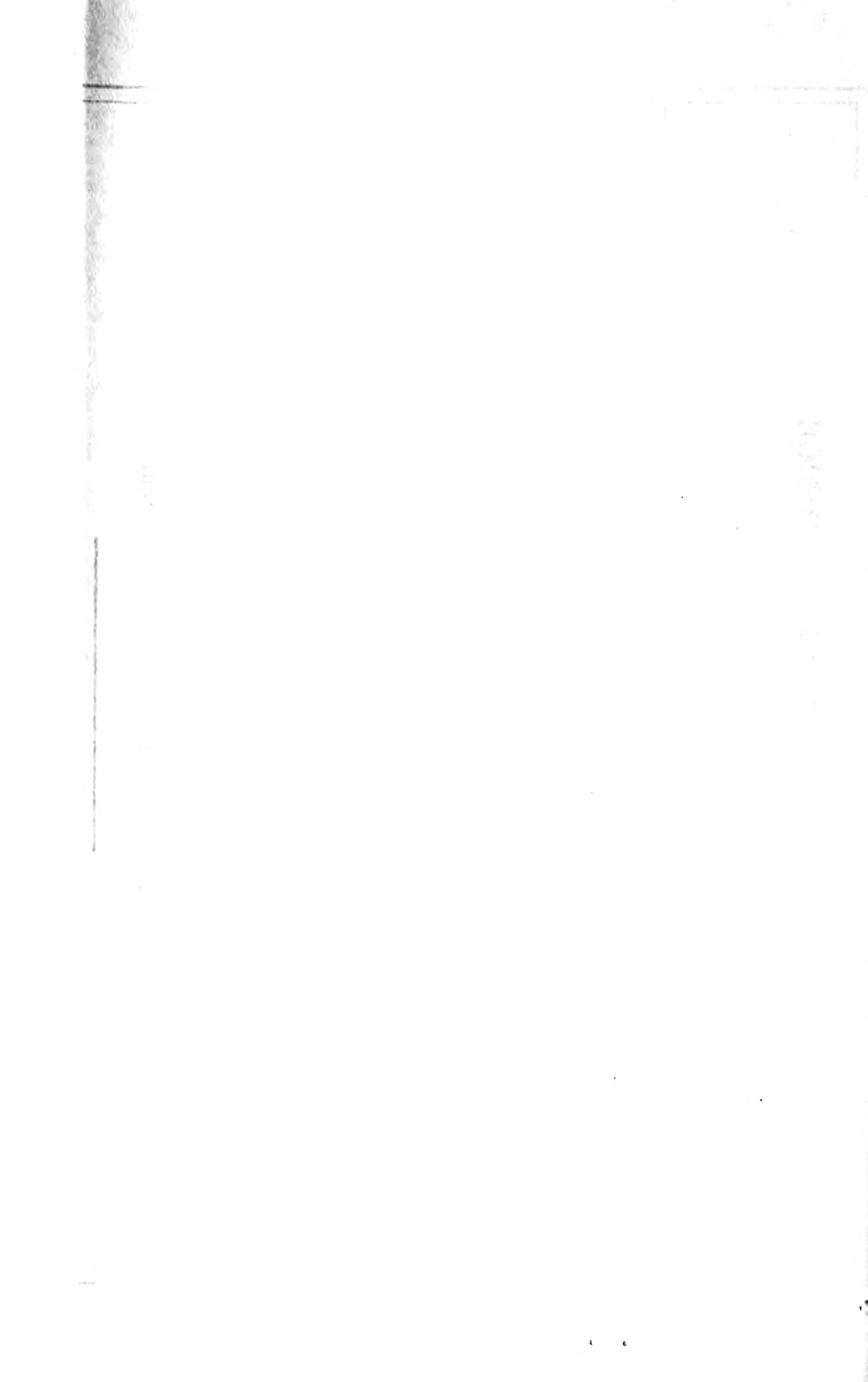
AND

SAND-LIME BRICK

PRODUCTION AND STOCKS, 1936

AUGUST 1937

#12427



CONTENTS

	Page
Introduction	1
Scope of the canvass	1
Descriptions of the industries	1

TABLES

Clay Products and Nonclay Refractories

Table 1.—Clay Products (including Pottery) and Nonclay Refractories—Number of Establishments and Total Value of Products, by States: 1936 and 1935 1

Clay Products (including Pottery)

Table 2.—Clay Products (other than Pottery) and Pottery—Value of Products: 1913 to 1936 (with graph) 2

Clay Products (other than Pottery)

Table 3.—Clay Products (other than Pottery)—Value of Principal Products: 1913 to 1936 (with graph) 3

Table 4.—Clay Products (other than Pottery)—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; for the United States: 1936, 1935, and 1934 4

Table 5.—Clay Products (other than Pottery)—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 7

Pottery

Table 6.—Pottery—Value of Principal Products: 1913 to 1936 (with graph) 20

Table 7.—Pottery—Number of Establishments; and Production, by Kind, Quantity, and Value; for the United States: 1936, 1935, and 1934 21

Table 8.—Pottery—Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 23

Nonclay Refractories

Table 9.—Nonclay Refractories—Value of Products: 1913 to 1936 (with graph) 30

Table 10.—Nonclay Refractories—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; for the United States: 1936, 1935, and 1934 31

Table 11.—Nonclay Refractories—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 31

Sand-Lime Brick

Table 12.—Sand-Lime Brick—Production, by Quantity and Value: 1923 to 1936 (with graph) 33

Table 13.—Sand-Lime Brick—Number of Establishments; Production, by Quantity and Value; and Stocks on Hand; for the United States, 1936, 1935, and 1934, and for States, 1936 and 1935 34

—o—

Prepared under the supervision of
LeVERNE BEALES
Chief Statistician for Manufactures

#12427

Introduction.---This report presents statistics, for 1936 as compared with prior years, of production and stocks on hand for establishments engaged in the manufacture of (1) clay products other than pottery, (2) pottery, (3) nonclay refractories, and (4) sand-lime brick.

Preliminary reports for 1936 as compared with 1935 for the Clay Products (including Pottery) and Nonclay Refractories industries and for the Sand-Lime Brick industry were issued under date of June 17, 1937, and June 8, 1937, respectively.

Scope of the canvass.---The Clay Products and Nonclay Refractories industries have been canvassed annually since 1921 by the Bureau of the Census, the reports for the odd-numbered years being included in the series presenting the reports of the biennial censuses of manufactures. The data collected for the even-numbered years relate only to production and stocks on hand, except for 1922, for which year data on production only were collected. The Sand-Lime Brick inquiry was added to this series of annual censuses in 1923. Annual statistics on production for the Clay Products and Nonclay Refractories industries were compiled by the Geological Survey, Department of the Interior, from 1913 to 1920, inclusive.

Descriptions of the industries.---The Clay Products (other than Pottery) industry embraces those establishments that are engaged primarily in the manufacture of building materials, such as brick, tile, terra cotta, etc., sewer pipe, draintile, and fire-clay and other refractory-clay products.

Establishments assigned to the Pottery industry are those whose leading products are white ware, hotel china, stoneware, vitreous-china plumbing fixtures, porcelain electrical supplies, and red earthenware. Separate data on the production of hotel china and of vitreous-china plumbing fixtures were not collected prior to the 1921 and 1925 censuses, respectively.

The Nonclay Refractories industry consists of those establishments that manufacture silica brick, magnesite and chrome brick, graphite crucibles, and other nonclay refractories. Silica brick is the only product of this industry for which data have been collected annually since 1913. No statistics are available, therefore, on the production of graphite crucibles for years prior to 1925 and of magnesite and chrome brick and other refractories for years prior to 1923.

The Sand-Lime Brick industry consists in the manufacture of brick from a combination of sand and lime or cement molded under heavy pressure and subjected to the action of steam in a hardening chamber.

Table 1.---Clay Products (including Pottery) and Nonclay Refractories---Number of Establishments and Total Value of Products, by States: 1936 and 1935

State	Number of establishments		Value of Products		
			1/ Total		Percent of increase, 1936 over 1935
	1936	1935	1936	1935	
United States	1,630	1,611	$245,915,448	$179,751,269	36.8
Alabama	31	30	2,717,484	1,757,093	54.7
Arizona	5	7	157,178	103,330	52.1
California	95	98	13,843,392	9,623,187	43.9
Florida	5	7	92,245	62,171	48.4
Georgia	34	24	2,863,828	2,274,407	25.9
Illinois	103	93	12,498,091	8,451,842	47.9
Indiana	66	64	8,904,620	5,724,369	55.6
Iowa	36	37	2,767,593	2,035,846	35.9
Kentucky	39	39	5,452,298	3,949,356	38.1
Louisiana	11	10	246,487	176,352	39.8
Maine	13	14	343,227	314,313	9.2
Mississippi	19	23	635,604	451,005	40.9
Missouri	41	37	11,807,537	8,180,813	44.3
New Jersey	83	86	20,547,231	15,194,939	35.2
New York	57	62	9,501,343	7,571,748	25.5
North Carolina	42	43	3,116,682	2,227,517	39.9
Ohio	266	266	48,441,083	38,200,104	26.8
Oklahoma	15	15	633,805	266,185	138.1
Oregon	15	14	478,480	291,022	64.4
Pennsylvania	205	205	46,813,076	33,318,518	40.5
Washington	27	22	1,295,494	785,670	64.9
West Virginia	37	40	15,907,234	13,893,012	14.5
Other States 2/	385	375	36,851,436	24,898,470	48.0

1/ Not including values of products not normally belonging to these industries, as follows: 1936, $158,486; 1935, $378,418.

2/ States included and numbers of establishments reporting for 1936 and 1935, respectively, are: Ark., 10, 10; Colo., 30, 31; Conn., 22, 17; Del., 5, 5; D. C., 4, 4; Idaho, 7, 6; Kans., 22, 21; Md., 24, 25; Mass., 20, 18; Mich., 21, 26; Minn., 14, 17; Mont., 10, 9; Nebr., 8, 11; Nev., 0, 1; N.H., 9,7; N. Mex., 5, 4; N. Dak., 3, 2; R. I., 1, 1; S. C., 22, 20; S. Dak., 2, 1; Tenn., 24, 25; Tex., 49, 38; Utah, 8, 9; Vt., 1, 1; Va., 34, 33; Wis., 26, 27; Wyo., 4, 6. Figures for these States have been combined in order to avoid disclosing approximations of data reported by individual establishments.

#12427

CLAY PRODUCTS (OTHER THAN POTTERY)
POTTERY

VALUE OF PRODUCTS, 1913 TO 1936

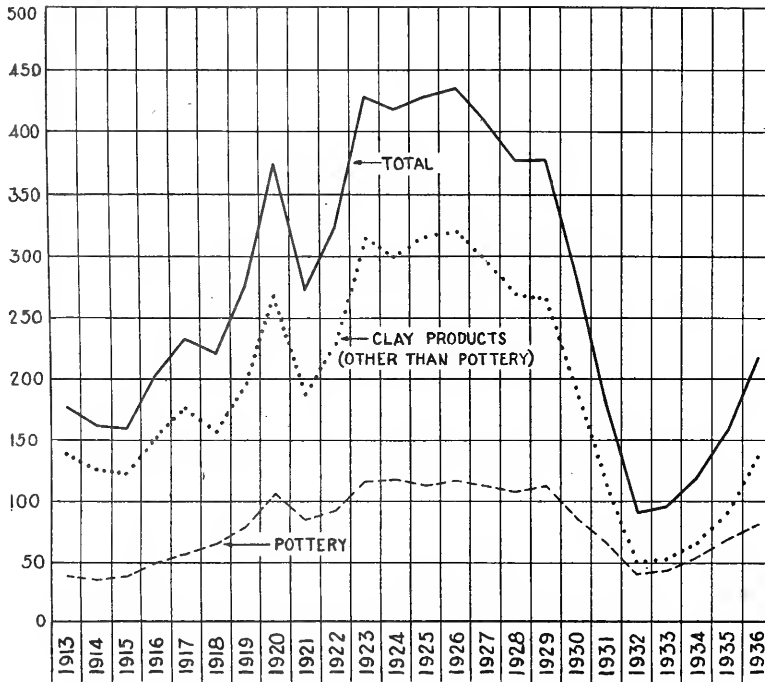


Table 2.---Clay Products (other than Pottery) and Pottery---Value of Products: 1913 to 1936

Year	Total	Clay products (other than pottery)	Pottery
1936	$217,570,731	$136,249,772	$81,320,959
1935	158,461,037	90,177,576	68,283,461
1934	118,735,841	66,179,814	52,556,027
1933	96,795,862	52,771,514	44,024,348
1932	90,576,863	50,203,504	40,373,359
1931	179,882,368	113,299,867	66,582,501
1930	278,937,861	193,356,778	85,581,083
1929	377,301,878	265,282,661	112,019,217
1928	377,225,228	269,444,859	107,780,369
1927	407,774,583	296,161,652	111,612,931
1926	434,423,553	317,930,245	116,493,308
1925	427,013,639	314,995,139	112,018,500
1924	417,976,669	299,961,684	118,014,985
1923	427,764,526	312,813,459	114,951,067
1922	321,494,403	229,508,106	91,986,297
1921	271,898,287	187,749,258	84,149,029
1920	373,670,102	266,953,426	106,716,676
1919	275,346,378	197,488,616	77,857,762
1918	220,573,493	156,661,700	63,911,793
1917	232,512,773	176,350,251	56,162,522
1916	200,890,835	152,673,593	48,217,242
1915	160,080,363	122,754,975	37,325,388
1914	162,035,458	126,637,297	35,398,161
1913	177,473,326	139,480,951	37,992,375

#12127

518

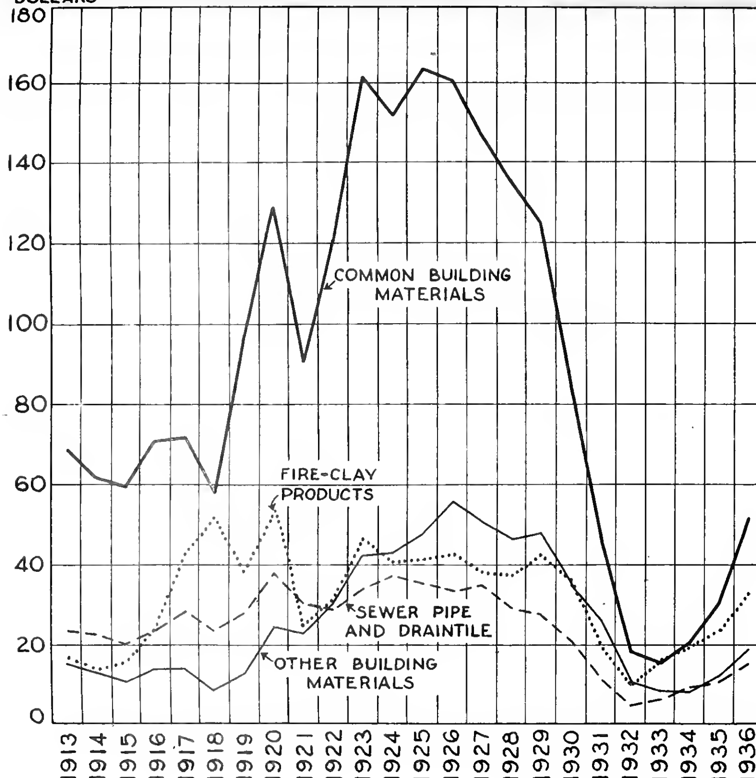


Table 3.—Clay Products (other than Pottery)—Value of Principal Products: 1913 to 1936

Year	1/Common building materials	2/Other building materials	3/Fire-clay products	Sewer pipe and draintile
1936	$51,748,071	$18,934,412	$32,885,945	$14,969,056
1935	30,718,349	12,062,490	23,831,349	10,618,703
1934	20,072,287	8,018,346	19,242,598	9,085,038
1933	15,459,987	8,437,070	16,127,758	6,038,358
1932	18,247,221	10,725,886	9,923,924	4,719,754
1931	46,095,004	26,121,036	19,487,388	11,115,443
1930	84,266,688	34,891,391	36,053,943	20,975,365
1929	124,994,728	48,026,327	42,376,118	27,845,885
1928	135,158,819	46,304,204	37,391,735	29,224,993
1927	146,428,006	50,877,727	38,173,878	34,937,214
1926	160,561,289	55,931,358	42,706,932	33,161,502
1925	163,243,249	47,820,437	41,163,701	35,381,251
1924	151,620,673	43,109,874	40,620,941	37,217,361
1923	161,639,301	42,213,371	46,676,637	34,202,466
1922	120,554,302	30,463,400	31,356,741	28,748,636
1921	90,065,265	22,911,247	24,833,297	30,523,342
1920	128,769,205	24,433,342	53,415,888	37,895,656
1919	97,582,380	13,050,189	38,015,792	27,700,775
1918	57,914,680	8,294,620	51,647,639	23,529,872
1917	71,583,145	14,076,742	42,501,669	28,315,374
1916	70,764,937	13,878,315	24,436,873	23,660,653
1915	59,481,766	10,927,350	15,800,062	20,138,613
1914	61,444,484	12,992,720	13,476,022	22,536,806
1913	68,369,111	15,177,897	16,811,316	23,430,423

1/ Common brick, face brick, hollow building tile.

2/ Terra cotta, fancy or ornamental brick, enameled brick, roofing tile, floor tile, ceramic mosaic tile (vitreous and semivitreous, unglazed), enameled tile (bright, dull, matt, and semimatt finishes) and glazed ceramic mosaic tile, faience tile (including hand-decorated), and wall tile (white and bright-glazed), including trim.

3/ Brick, block, or tile (9-inch equivalent), high-alumina brick (over 40 per cent Al_2O_3), special shapes.

#12427

Table 4.--Clay Products (other than Pottery)--Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; for the United States: 1936, 1935, and 1934

Kind and Year	Number of establishments 1/	Production		Stocks on hand December 31
		Quantity	Value	
Total:				
1936	1,277	--------	$136,249,772	--------
1935	1,259	--------	90,177,576	--------
1934	1,275	--------	66,179,814	--------
		Thousands		Thousands
Common brick:				
1936	747	2,966,521	30,108,170	653,450
1935	740	1,811,341	18,238,060	697,882
1934	693	1,098,689	11,419,108	606,060
Face brick:				
1936	384	848,780	12,726,556	412,149
1935	366	472,587	7,011,056	373,466
1934	348	305,208	4,749,250	384,632
Hollow brick:				
1936	25	8,361	121,141	3,098
1935	23	9,083	246,149	5,731
1934	25	6,136	84,677	4,150
Salt-glazed brick:				
1936	15	48,606	1,029,795	13,352
1935	(2)	(2)	(2)	(2)
1934	(2)	(2)	(2)	(2)
		Short tons		Short tons
Terra cotta:				
1936	18	22,944	2,564,749	4,550
1935	16	17,552	1,527,966	4,151
1934	22	13,281	1,127,826	4,706
Hollow building tile:				
(a) Partition, load-bearing, furring, and book tile:				
1936	328	1,437,756	8,208,097	511,820
1935	319	842,264	4,963,484	497,524
1934	299	635,836	3,500,922	511,972
(b) Conduit:				
1936	15	24,122	274,559	27,560
1935	15	19,304	191,903	30,351
1934	16	15,370	155,880	51,315
(c) Floor-arch, silo, and corncrib tile; radial chimney blocks; fire-proofing tile:				
1936	30	73,008	430,689	24,116
1935	32	51,522	313,846	27,819
1934	28	36,504	247,127	18,557
Tile (other than hollow and drain):		Squares (100 sq.ft.)		Squares (100 sq. ft.)
(a) Roofing tile:				
1936	45	211,284	2,205,784	86,212
1935	42	134,922	1,145,434	69,769
1934	44	113,327	1,168,641	84,549
(b) Floor tile (plain, vitreous, encaustic, quarry, etc.):		Square feet		Square feet
1936	52	12,317,406	1,725,144	3,857,982
1935	52	7,554,651	1,083,771	4,702,696
1934	51	5,234,082	691,444	5,562,403
(c) Ceramic mosaic (vitreous and semivitreous, unglazed):				
1936	17	8,584,632	1,819,739	3,576,128
1935	21	6,416,303	1,317,285	3,034,683
1934	17	3,935,543	813,526	3,249,731
(d) Enameled tile (bright, dull, matt, and semimatt finishes) and glazed ceramic mosaic:				
1936	19	20,811,261	6,588,883	4,441,992
1935	17	12,100,646	3,551,485	3,830,108
1934	20	6,172,225	2,197,313	4,203,080

#12427

Table 4.—Clay Products (other than Pottery)—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; for the United States: 1936, 1935, and 1934 (Continued)

Kind and Year	Number of establishments1/	Production		Stocks on hand December 31
		Quantity	Value	
Tile (other than hollow and drain) (Continued):		Square feet		Square feet
(e) Faience tile (including hand-decorated tile):				
1936	20	743,300	$403,038	564,082
1935	23	524,319	310,816	553,484
1934	26	652,744	283,389	915,249
(f) Wall tile (white and bright-glazed), including trim:				
1936	24	13,094,864	3,211,528	2,328,672
1935	28	10,704,746	3,090,729	2,168,445
1934	20	7,305,071	1,550,622	2,525,546
Vitrified brick and plates:		Thousands		Thousands
(a) For paving:				
1936	63	79,043	1,868,290	56,687
1935	74	71,800	1,724,002	67,341
1934	72	99,718	2,231,919	66,943
(b) Sewer liners:		Short tons		Short tons
1936	11	9,878	112,996	4,456
1935	14	5,129	75,150	6,529
1934	(2)	(2)	(2)	(2)
(c) For other purposes:		Thousands		Thousands
1936	27	18,169	308,314	14,425
1935	28	11,452	171,291	23,220
1934	34	14,079	202,233	35,323
Draintile:		Short tons		Short tons
Total:				
1936	245	338,428	2,509,791	111,675
1935	240	264,123	2,001,570	148,121
1934	236	168,126	1,172,368	102,784
(a) Vitrified (underdrain):				
1936	88	157,550	1,198,934	44,571
1935	84	109,394	885,413	62,744
1934	(2)	(2)	(2)	(2)
(b) Unvitrified:				
1936	167	180,878	1,310,857	67,104
1935	163	154,729	1,116,157	85,377
1934	(2)	(2)	(2)	(2)
Sewer pipe:				
1936	83	990,984	12,459,265	391,406
1935	85	670,181	8,617,133	356,035
1934	78	661,222	7,912,670	356,219
Stove lining:				
1936	17	12,970	368,347	3,563
1935	15	7,614	236,332	3,685
1934	15	4,626	178,566	1,851
Flue lining:				
1936	80	128,440	1,610,639	35,799
1935	81	98,484	1,167,624	27,325
1934	79	47,331	563,563	26,459
Chimney pipe and tops:				
1936	37	6,881	182,927	3,387
1935	41	4,251	91,856	3,516
1934	32	2,299	47,421	3,080
Wall coping:				
1936	58	20,783	249,794	8,004
1935	51	19,094	222,997	4,292
1934	50	10,719	109,403	5,954
Segment blocks:				
1936	10	11,251	136,977	8,465
1935	11	9,169	105,540	10,845
1934	14	11,474	110,792	13,547

#12427

Table 4.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; for the United States: 1936, 1935, and 1934 (Continued)

Kind and Year	Number of estab-lish-ments1/	Production: Quantity	Production: Value	Stocks on hand December 31
Fire-clay products:				
(a) Brick, block, and tile, except high-alumina (9-inch equivalent):		Thousands		Thousands
1936	172	615,498	$26,579,979	193,849
1935	183	481,679	19,495,591	193,996
1934	181	390,214	15,485,175	166,403
(b) High-alumina brick (over 40% Al_2O_3):				
1936	21	11,151	1,122,117	4,217
1935	27	13,220	1,071,029	8,565
1934	25	15,719	1,023,747	7,341
(c) Special shapes:		Short tons		Short tons
1936	67	226,791	5,183,849	74,100
1935	72	156,111	3,264,729	54,949
1934	69	115,492	2,733,676	45,234
(d) Plastic fire brick:				
1936	36	39,378	1,099,364	2,236
1935	(2)	(2)	(2)	(2)
1934	(2)	(2)	(2)	(2)
(e) Ladle brick:		Thousands		Thousands
1936	7	59,323	1,118,394	5,324
1935	(2)	(2)	(2)	(2)
1934	(2)	(2)	(2)	(2)
Glass-house tank blocks, melting pots, stoppers, floaters, and rings:		Short tons		Short tons
1936	14	29,478	2,483,669	16,882
1935	14	27,525	2,441,113	17,567
1934	16	25,203	2,375,693	19,535
Refractory cement (clay):				
1936	64	41,456	1,942,497	5,076
1935	62	36,905	1,734,855	3,231
1934	57	24,665	1,267,470	2,414
Clay sold, raw or prepared, including fire-clay dust:				
1936	177	377,344	1,583,128	------
1935	159	252,670	1,190,559	------
1934	175	253,311	1,296,740	------
Other clay products, except pottery:				
1936	70	------	3,961,563	------
1935	80	------	3,574,221	------
1934	48	------	1,478,653	------

1/ The totals in this column do not equal the sums of the individual items, for the reason that in some cases two or more of the products named are manufactured by the same establishment.

2/ No data.

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Common brick:		Thousands		Thousands		Thousands		Thousands
Alabama	21	121,221	$969,986	12,930	20	64,078	$488,341	13,032
Arizona	4	11,512	120,478	845	7	6,314	65,356	2,397
Arkansas	6	26,525	219,908	4,705	6	14,815	128,203	4,670
California	32	102,616	1,049,501	35,104	27	58,125	586,831	33,557
Colorado	17	30,240	314,892	10,542	19	16,601	164,889	12,381
Florida	4	11,035	86,445	1,145	4	5,734	45,571	1,760
Georgia	13	122,365	903,058	11,327	13	98,383	744,507	9,524
Idaho	6	5,575	75,409	2,130	5	4,552	56,033	1,987
Illinois	53	221,452	2,055,708	76,215	43	114,131	1,040,361	77,076
Indiana	24	74,236	736,347	14,074	26	38,241	397,826	13,994
Iowa	22	39,660	424,066	7,910	26	30,187	330,858	18,540
Kansas	12	21,049	169,671	8,013	12	15,497	127,133	8,801
Kentucky	18	49,422	471,645	13,939	17	28,223	277,338	11,911
Louisiana	10	21,064	194,286	3,186	9	13,124	123,719	4,040
Maine	11	11,927	156,767	6,097	12	8,513	123,650	8,148
Maryland	14	58,357	725,469	12,248	14	36,453	476,373	14,565
Massachusetts	10	49,986	606,073	14,577	10	35,134	430,177	21,527
Michigan	6	93,609	1,031,723	15,782	9	39,660	320,535	9,142
Minnesota	10	26,492	296,970	10,202	12	14,438	164,593	9,490
Mississippi	11	50,984	493,244	4,100	15	33,438	337,800	8,840
Missouri	19	49,344	517,742	11,665	15	29,927	329,487	12,071
Montana	10	8,067	121,313	2,802	9	5,770	85,012	2,832
Nebraska	6	19,430	207,427	5,034	9	15,975	161,332	8,020
New Jersey	13	83,896	1,003,990	15,080	13	74,931	851,226	22,709
New Mexico	5	6,517	83,603	1,964	4	2,751	34,486	2,204
New York	33	387,936	3,165,495	95,946	35	234,493	1,967,783	92,498
North Carolina	35	214,907	2,192,034	15,041	34	149,043	1,429,837	23,570
Ohio	48	128,785	1,474,926	27,611	45	56,973	647,823	27,730
Oklahoma	12	33,678	327,196	4,138	11	13,557	141,806	3,264
Oregon	10	9,628	144,924	2,534	11	4,259	66,565	2,644
Pennsylvania	67	211,542	2,507,392	53,663	69	134,778	1,636,759	62,935
South Carolina	16	102,945	947,939	5,631	15	65,636	595,997	10,182
Tennessee	17	92,182	881,290	17,182	20	44,007	444,758	12,603
Texas	35	123,536	1,078,819	31,181	30	63,856	580,843	25,872
Utah	6	16,390	192,002	5,200	7	9,430	110,493	3,651
Virginia	28	108,447	1,270,446	23,339	27	80,771	910,434	18,398
Washington	14	22,515	292,954	5,171	13	13,643	171,339	5,131
West Virginia	11	26,201	308,583	4,110	11	16,185	189,185	4,766
Wisconsin	16	23,268	258,387	10,192	19	22,283	215,889	20,739
Wyoming	4	2,335	35,898	474	6	1,632	23,810	2,587
Connecticut	17	64,815	831,162	26,611	12	36,192	409,765	25,655
Rhode Island	1				1			
Delaware	5	59,299	796,712	9,396	5	45,469	568,324	8,520
District of Columbia	1				1			
Nevada	-				1			
North Dakota	3				2			
South Dakota	1				1			
New Hampshire	9	21,531	366,290	14,414	7	14,139	235,013	13,919
Vermont	1				1			
Face brick:								
Alabama	14	17,895	229,443	7,384	12	14,318	152,748	6,441
California	12	2,279	80,091	6,296	16	799	30,048	6,780
Colorado	11	14,546	220,285	7,132	10	6,641	103,667	9,852
Georgia	6	17,797	202,930	5,344	6	13,875	167,594	5,624
Illinois	26	93,476	1,392,689	28,466	22	56,100	779,402	25,807
Indiana	19	57,118	959,024	34,221	18	27,720	445,143	16,427
Iowa	18	16,404	225,064	7,973	18	10,047	144,385	8,607
Kansas	8	6,345	84,122	7,105	10	5,931	80,609	9,545
Kentucky	7	6,149	87,978	632	7	8,595	103,719	1,248

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936 Number of establishments	1936 Production Quantity	1936 Production Value	1936 Stocks on hand Dec. 31	1935 Number of establishments	1935 Production Quantity	1935 Production Value	1935 Stocks on hand Dec. 31
		Thousands		Thousands		Thousands		Thousands
Face brick (Continued):								
Maryland	5	22,492	$328,719	6,361	6	15,859	$279,635	7,419
Missouri	12	27,661	421,263	12,681	12	13,121	192,553	15,274
Montana	3	3,133	67,748	1,563	3	2,449	56,076	927
Nebraska	5	4,676	70,609	2,597	5	3,532	53,200	3,328
North Carolina	13	23,055	316,877	7,369	9	14,141	182,367	2,476
Ohio	44	156,046	2,109,502	82,757	40	81,915	1,140,900	79,135
Oklahoma	11	11,887	172,968	7,371	10	3,906	60,668	6,483
Pennsylvania	56	123,297	1,910,568	72,478	56	58,723	925,690	65,545
South Carolina	4	8,990	100,901	1,500	4	4,168	52,258	1,267
Tennessee	8	24,293	344,647	10,026	8	14,443	185,912	6,273
Texas	20	48,351	656,399	34,286	13	22,247	318,557	29,648
Utah	6	7,652	190,540	3,288	6	3,762	92,169	2,346
Virginia	14	30,256	514,458	8,860	12	20,498	313,826	7,356
Washington	10	8,095	175,063	3,886	9	4,226	76,402	4,536
West Virginia	10	13,894	222,835	4,222	10	12,496	189,398	6,303
Wisconsin	4	3,214	52,811	1,807	4	3,092	50,300	1,347
Arizona	-				1			
Idaho	3	2,059	47,529	2,371	3	959	17,350	2,076
Nevada	-				1			
New Mexico	2				2			
Arkansas	5				5			
Louisiana	1	36,249	528,517	20,869	1	18,345	275,966	21,103
Mississippi	3				4			
Connecticut	2				1			
Maine	1	12,157	222,273	4,095	1	3,006	62,246	3,231
Massachusetts	1				1			
Rhode Island	1				1			
Michigan	2	25,856	388,348	9,111	3	13,994	250,156	9,741
Minnesota	2				2			
New Jersey	2	15,601	231,180	3,806	2	10,596	160,521	4,063
New York	4				5			
North Dakota	1				-			
Oregon	5	7,857	171,175	6,292	4	3,083	67,591	3,258
South Dakota	1				1			
Wyoming	2				2			
Hollow brick:								
California	1				-			
Colorado	1				1			
Iowa	1	3,236	29,855	914	1	445	4,526	549
Minnesota	1				1			
Texas	2				2			
Connecticut	1				-			
Illinois	3				2			
Indiana	1	4,000	68,916	1,673	2	7,372	219,688	4,377
Michigan	1				-			
New York	2				1			
Ohio	5				6			
North Carolina	-				1			
Pennsylvania	4				3			
South Carolina	1	1,125	22,370	511	1	1,266	21,935	805
Virginia	1				1			
West Virginia	-				1			
Salt-glazed brick:								
Ohio	6	45,962	947,107	10,808				
Colorado	2							
Pennsylvania	2							
Texas	1	2,644	82,688	2,544	(1)	(1)	(1)	(1)
Utah	2							
Washington	1							
Wyoming	1							

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Terra cotta:		Short tons		Short tons		Short tons		Short tons
California......	3	3,830	$336,917	345	3	3,054	$280,920	457
Colorado........	1				1			
Kansas..........	1	1,805	263,920	2,954	1	1,397	156,286	566
Missouri........	1				1			
Washington......	1				1			
Illinois........	3				3			
Indiana.........	1				-			
New Jersey......	4	17,309	1,963,912	1,251	3	13,101	1,090,760	3,128
New York........	1				1			
Pennsylvania....	2				2			
Hollow building tile:								
(a) Partition, load-bearing, furring, and book tile:								
Alabama.........	9	21,356	164,229	11,303	6	13,636	64,015	17,276
Arkansas........	4	23,061	137,510	13,355	4	8,435	49,734	9,534
California......	12	13,495	161,061	29,586	13	9,857	126,530	36,559
Colorado........	7	15,258	141,013	6,066	7	5,490	47,216	7,107
Georgia.........	4	53,401	199,285	15,225	3	27,829	100,737	15,971
Illinois........	30	126,595	615,547	44,709	25	56,052	250,751	41,852
Indiana.........	19	63,933	411,931	22,700	19	36,837	299,635	31,223
Iowa............	23	177,008	1,064,123	61,008	25	130,671	762,519	64,809
Kansas..........	12	29,112	148,082	19,670	12	13,162	65,659	17,206
Kentucky........	5	11,863	52,869	920	7	12,976	58,043	4,394
Missouri........	10	27,247	148,950	7,541	10	16,727	83,756	8,593
Montana.........	5	5,030	46,090	1,929	5	7,205	72,049	2,856
Nebraska........	5	21,817	113,431	6,096	5	14,732	85,016	6,507
New York........	5	44,883	342,580	13,295	6	31,598	241,101	11,495
Ohio............	45	263,219	1,250,008	93,638	47	138,258	923,397	72,715
Oklahoma........	11	24,690	116,922	9,994	11	9,196	47,354	10,033
Oregon..........	10	13,853	94,680	3,371	11	8,618	76,457	3,559
Pennsylvania....	20	82,079	409,224	29,159	17	50,934	251,383	26,450
Tennessee.......	5	20,531	112,609	8,026	5	6,389	30,957	8,261
Texas...........	17	103,559	511,088	35,266	12	46,919	237,675	28,533
Utah............	5	2,460	23,634	1,511	5	1,824	22,359	1,212
Washington......	9	8,599	69,910	4,322	9	4,254	32,096	3,935
West Virginia...	11	73,009	392,344	10,230	11	60,036	294,901	8,324
Wyoming.........	3	2,421	21,659	207	3	2,752	24,494	804
Arizona.........	2				1			
Idaho...........	1	7,744	55,462	2,517	1	4,455	38,477	4,664
Nevada..........	-				1			
New Mexico......	3				2			
Connecticut.....	1				1			
Massachusetts...	1	139,204	920,095	48,060	1	79,032	409,709	32,393
Michigan........	4				5			
New Jersey......	8				6			
Louisiana.......	1				1			
Maryland........	3				3			
Mississippi.....	2	32,692	214,238	6,442	2	24,910	153,976	14,517
North Carolina..	3				2			
Virginia........	4				4			
Minnesota.......	4				5			
North Dakota....	2	29,637	269,523	5,674	1	19,480	113,488	6,742
South Dakota....	1				1			
Wisconsin.......	2				4			

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936 Number of establishments	1936 Production Quantity	1936 Production Value	1936 Stocks on hand Dec. 31	1935 Number of establishments	1935 Production Quantity	1935 Production Value	1935 Stocks on hand Dec. 31
Hollow building tile (Continued):		Short tons		Short tons		Short tons		Short tons
(b) Conduit:								
California	3				4			
Colorado	1				1			
Illinois	1	3,527	$84,530	6,623	-	3,575	$67,577	6,538
Indiana	2				1			
Minnesota	1				1			
Washington	1				-			
Kentucky	-				1			
New Jersey	1				-			
North Carolina	1	20,595	190,029	20,937	1	15,729	124,326	23,813
Ohio	3				4			
Pennsylvania	1				1			
Tennessee	-				1			
(c) Floor-arch, silo, and corncrib tile; radial chimney blocks; fireproofing tile:								
Iowa	8	29,254	203,893	7,835	6	16,827	119,497	4,050
Alabama	1				1			
Arkansas	1	3,799	11,861	304	2	2,270	11,192	1,015
North Carolina	1				-			
California	-				1			
Colorado	2				1			
Illinois	1				2			
Indiana	1				1			
Kansas	3	9,719	68,574	3,999	4	9,344	61,876	4,455
Minnesota	1				1			
Missouri	1				1			
North Dakota	1				-			
Oklahoma	1				-			
Washington	1				-			
Maryland	1				-			
New Jersey	-				1			
Ohio	2	30,236	146,361	11,978	6	23,081	121,281	18,299
Pennsylvania	2				3			
West Virginia	2				2			
Tile (other than hollow and drain):		Squares (100 sq. ft.)		Squares (100 sq. ft.)		Squares (100 sq. ft.)		Squares (100 sq. ft.)
(e) Roofing tile:								
California	21	92,123	763,351	27,488	25	68,619	407,282	25,740
Texas	5	5,116	36,111	4,562	3	3,859	21,266	8,867
Alabama	1				1			
Arizona	1				1			
Colorado	1				1			
Indiana	-				1			
Kansas	2				1			
Kentucky	1				1			
Louisiana	1	114,045	1,406,322	54,162	1	62,444	716,886	40,162
Minnesota	1				-			
New Mexico	2				1			
Ohio	2				1			
Pennsylvania	1				1			
Tennessee	1				2			
Utah	1				-			
Washington	4				2			

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Tile (other than hollow and drain)---Continued:		Sq. ft.		Sq. ft.		Sq. ft.		Sq. ft.
(b) Floor tile (plain, vitreous, encaustic, quarry, etc.):								
California.....	18	615,805	$143,809	583,214	19	391,671	$109,792	403,595
Indiana........	3	369,442	59,946	41,969	3	279,481	40,306	442,390
New Jersey.....	7	3,188,444	594,825	1,220,951	5	1,949,131	357,338	953,156
Colorado.......	2				2			
New Mexico.....	1				1			
Texas..........	1	95,160	19,029	87,707	-	53,106	10,375	92,568
Utah...........	1				-			
Washington.....	2				1			
Wyoming........	1				1			
Florida........	1				1			
Georgia........	-				1	2,787,480	144,335	1,709,681
Kentucky.......	1				1			
Tennessee......	1	3,709,327	186,746	950,835	2			
Iowa...........	-				1			
Minnesota......	1				1	29,950	8,956	10,922
Wisconsin......	1				1			
Massachusetts..	1				1			
New Hampshire..	1				-			
New York.......	1	4,339,228	720,789	973,306	1	2,063,832	412,669	1,090,384
Ohio...........	4				5			
Pennsylvania...	3				4			
West Virginia..	1				1			
(c) Ceramic mosaic (vitreous and semivitreous, unglazed):								
Ohio...........	4	3,674,618	793,247	1,246,132	5	2,436,961	467,461	1,032,047
Pennsylvania...	3	741,469	140,444	738,876	3	433,149	86,145	334,993
California.....	2				5			
Georgia........	1				-			
Indiana........	2				2			
New Jersey.....	2	4,168,545	886,048	1,591,120	3	3,546,193	763,679	1,667,643
New York.......	1				1			
West Virginia..	1				1			
Wisconsin......	1				1			
(d) Enameled tile (bright, dull, matt, and semimatt finishes) and glazed ceramic mosaic:								
Ohio...........	4	10,245,883	2,704,290	1,984,041	5	6,651,557	1,795,713	1,780,127
California.....	5	3,378,637	1,498,558	539,553	3	53,918	24,338	35,682
Colorado.......	1				1			
Florida........	1				1			
Indiana........	2	2,985,985	1,037,350	852,082	2	2,785,792	899,424	1,087,142
Kentucky.......	1				1			
West Virginia..	1				1			
New Jersey.....	1				1			
New York.......	1	4,202,756	1,348,685	1,066,316	-	2,609,379	832,010	927,157
Pennsylvania...	2				2			

#12427

Table 5.—Clay Products (other than Pottery)—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Tile (other than hollow and drain)—Continued:		Sq. ft.		Sq. ft.		Sq. ft.		Sq. ft.
(e) Faience tile (including hand-decorated tile):								
California.....	7	536,715	$184,532	221,965	9	296,136	$134,441	161,439
New Jersey.....	4	35,033	43,677	206,373	4	27,312	26,091	215,038
Kentucky.......	-				1			
Texas..........	2	23,207	11,169	30,541	1	23,431	12,026	24,824
Washington.....	2				1			
Wisconsin......	1				1			
Michigan.......	1				1			
Ohio...........	2	148,345	163,660	105,203	4	177,440	138,258	132,183
Pennsylvania...	1				1			
(f) Wall tile (white and bright-glazed), including trim:								
California.....	7	1,303,286	328,491	105,739	8	2,964,260	1,154,294	305,353
Ohio...........	4	3,102,435	724,994	769,477	6	2,658,325	664,999	855,966
Georgia........	1				1			
New Jersey.....	3	6,596,402	1,519,053	1,098,901	4	4,273,206	1,033,784	684,825
Pennsylvania...	2				2			
West Virginia..	1				2			
Illinois.......	1				1			
Indiana........	3				2			
Kentucky.......	-	2,092,741	638,990	354,555	1	808,955	237,652	322,301
Washington.....	1				-			
Wisconsin......	1				1			
Vitrified brick and plates:		Thousands		Thousands		Thousands		Thousands
(a) For paving:								
Illinois.......	6	12,263	244,235	3,346	9	7,638	142,369	4,275
Ohio...........	17	37,122	894,453	33,097	17	38,326	1,011,815	35,690
Pennsylvania...	9	8,033	203,866	8,287	8	10,208	257,841	8,487
West Virginia..	3	2,803	67,971	1,394	5	768	18,095	3,045
Alabama........	1				1			
Georgia........	2				2			
Iowa...........	2	2,239	38,264	4,774	3	1,853	36,126	6,778
Missouri.......	1				2			
Tennessee......	1				1			
California.....	2				5			
Colorado.......	1				1			
Kansas.........	5	5,487	112,683	2,307	7	6,143	101,533	5,649
Oklahoma.......	4				4			
Texas..........	2				2			
Washington.....	1				1			
Indiana........	4				3			
Maryland.......	1	11,096	306,818	3,482	1	6,864	156,223	3,417
Massachusetts..	-				1			
New York.......	1				1			
(b) Sewer liners:		Short tons		Short tons		Short tons		Short tons
Ohio...........	6	6,333	56,181	3,513	7	2,615	29,034	5,146
California.....	1				2			
Illinois.......	-				1			
Kansas.........	-				1			
Minnesota......	2	3,545	56,815	943	1	2,514	46,116	1,383
North Carolina.	-				1			
Pennsylvania...	1				1			
Texas..........	1				-			

#12487

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936 Number of establishments	1936 Production Quantity	1936 Production Value	1936 Stocks on hand Dec. 31	1935 Number of establishments	1935 Production Quantity	1935 Production Value	1935 Stocks on hand Dec. 31
Vitrified brick and plates (Continued):								
(c) For other purposes:		Thousands		Thousands		Thousands		Thousands
Ohio	10	8,121	$129,398	9,666	13	7,035	$98,420	15,468
Alabama	1				1			
New York	1				1			
North Carolina	-	1,344	21,756	339	1	1,401	34,796	1,048
Tennessee	-				1			
West Virginia	1				1			
California	4	5,303	109,207	429	-			
Colorado	1				1			
Illinois	3				5			
Indiana	2				2	3,016	38,075	6,704
Missouri	1	3,401	47,953	3,991	-			
New Jersey	1				-			
Pennsylvania	2				2			
Drain tile:								
(a) Vitrified (underdrain):		Short tons		Short tons		Short tons		Short tons
California	3	1,186	23,530	355	4	565	10,525	343
Colorado	4	1,225	12,001	868	3	666	5,860	821
Illinois	5	1,964	22,026	1,068	6	1,365	14,748	2,685
Iowa	13	19,518	148,796	13,479	15	13,896	109,326	13,096
Kentucky	3	1,781	15,621	482	4	2,007	19,802	529
Michigan	3	14,624	138,023	961	3	14,325	120,705	1,445
Missouri	7	1,958	16,665	1,627	7	2,030	21,557	1,459
Ohio	15	98,831	656,179	19,134	18	64,260	473,231	38,339
Alabama	1				1			
Arkansas	2				2			
Mississippi	1	2,653	18,730	1,256	-	2,434	17,077	1,398
Oklahoma	1				2			
Tennessee	1				-			
Texas	3				3			
District of Columbia	1				1			
Georgia	1	3,978	46,013	809	-	3,156	34,339	775
North Carolina	2				2			
South Carolina	1				1			
Indiana	5				2			
Kansas	4				3			
Minnesota	1	5,231	52,840	2,322	2	2,776	30,022	1,121
New York	-				1			
South Dakota	1				-			
Oregon	3				-			
Utah	2	4,601	48,510	2,210	2	1,914	28,221	733
Washington	4				1			
Wyoming	1				1			
(b) Unvitrified:								
California	13	3,481	60,017	4,048	14	3,292	50,271	3,902
Illinois	23	50,299	341,430	15,488	18	44,307	285,167	17,086
Indiana	19	34,765	223,466	15,151	22	24,040	162,373	13,402
Iowa	14	24,336	182,765	5,273	11	22,134	161,156	5,082
Kentucky	4	1,656	10,536	638	7	2,585	14,626	1,961
Michigan	3	1,960	13,913	457	3	1,511	11,405	7,100
Missouri	6	2,140	18,407	1,105	4	755	6,354	532
Ohio	34	34,165	234,181	14,306	30	29,363	178,064	17,230
Oregon	7	3,495	27,196	1,217	9	4,997	44,234	1,132
Washington	7	2,915	27,210	1,403	7	2,423	26,243	1,143
Alabama	2				1			
Georgia	2	8,096	60,883	2,022	2	5,242	43,484	1,558
Mississippi	1				2			
Tennessee	2				3			

#12427

Table 5.—Clay Products (other than Pottery)—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Draintile:								
(b) Unvitrified (Continued):		Short tons		Short tons		Short tons		Short tons
Arkansas.......	1	2,978	$22,856	1,599	1	2,203	$20,363	1,019
Texas..........	4				3			
Colorado.......	1				2			
Idaho..........	1	212	3,357	262	1	630	7,882	648
New Mexico.....	1				1			
Utah...........	1				-			
District of Columbia.....	1				1			
Maryland.......	1	934	13,010	625	1	1,165	16,350	10,104
Virginia.......	1				1			
West Virginia..	1				1			
Kansas.........	1				2			
Minnesota......	3				1			
Nebraska.......	1	5,536	37,975	2,162	3	7,212	64,161	2,707
South Dakota...	-				1			
Wisconsin......	3				6			
New Jersey.....	2				1			
New York.......	5	3,912	33,655	1,348	3	2,870	24,024	771
Pennsylvania...	2				1			
Sewer pipe:								
California.....	8	62,742	1,503,347	34,852	12	35,965	869,211	38,315
Georgia........	3	26,017	287,211	12,130	3	18,821	294,045	10,962
Illinois.......	3	22,760	321,293	6,705	4	19,471	295,478	13,419
Indiana........	6	50,405	619,316	10,870	5	27,364	296,517	8,402
Iowa...........	3	31,561	423,018	17,383	3	21,061	295,429	21,329
Kentucky.......	3	34,237	389,074	6,175	3	32,144	391,580	6,195
Missouri.......	4	61,496	886,254	34,902	3	27,035	445,628	19,568
Ohio...........	25	384,326	4,141,756	170,847	24	235,226	2,378,477	138,763
Pennsylvania...	5	147,839	1,613,073	30,973	5	128,073	1,238,248	27,285
Alabama........	1				1			
North Carolina.	2	56,405	749,328	13,550	3	41,839	687,037	19,458
South Carolina.	1				1			
Colorado.......	2				2			
Texas..........	3				3			
Utah...........	3	62,004	871,387	28,691	2	41,078	691,865	31,522
Washington.....	3				3			
Wyoming........	1				1			
District of Columbia.....	2	1,420	22,605	867	2	1,532	26,980	478
Virginia.......	1				1			
Kansas.........	1				1			
Maine..........	1	49,771	631,603	23,461	1	40,572	706,638	20,339
Michigan.......	1				1			
Minnesota......	1				1			
Stove lining:								
Massachusetts..	3	2,745	102,188	1,032	3	2,688	107,779	1,147
Georgia........	1				-			
Illinois.......	-				1	1,681	31,718	1,000
Kentucky.......	1				1			
Missouri.......	1				1			
Maryland.......	1	10,225	266,159	2,531	1			
New York.......	2				2			
Ohio...........	4				3	3,245	96,835	1,538
Pennsylvania...	3				2			
South Carolina.	1				1			

#12487

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Flue lining:		Short tons		Short tons		Short tons		Short tons
California....	8	4,698	$176,313	2,466	13	2,293	$84,966	3,138
Illinois......	4	3,502	44,485	1,674	5	1,989	29,421	924
Iowa..........	3	3,376	37,711	1,565	3	3,457	43,169	2,068
Ohio..........	23	52,726	546,785	11,347	22	37,099	346,771	7,699
Pennsylvania..	5	22,901	250,763	7,081	5	23,391	197,232	2,174
Alabama.......	1				1			
Arkansas......	1				-			
Georgia.......	2	8,068	75,535	3,672	2	8,694	121,147	3,107
South Carolina	1				1			
Texas.........	3				3			
Colorado......	2				2			
Oregon........	1				1			
Utah..........	2	3,670	87,499	1,341	2	2,085	57,218	1,357
Washington....	3				3			
Wyoming.......	1				1			
District of Columbia....	2	3,766	56,638	1,255	2	3,241	61,075	2,228
Maine.........	1				1			
Indiana.......	4				3			
Kentucky......	3	12,508	136,858	1,733	2	7,531	85,760	1,854
Michigan......	1				1			
Kansas........	1				1			
Minnesota.....	1	9,441	132,888	3,069	1	6,116	103,460	2,061
Missouri......	4				3			
North Carolina	2	3,784	65,164	596	2	2,588	37,405	715
Virginia......	1				1			
Chimney pipe and tops:								
California....	7	3,641	93,135	1,699	9	1,902	58,365	1,899
Kentucky......	3	537	6,252	119	3	479	6,979	55
Missouri......	3	77	1,370	85	3	54	1,837	93
Ohio..........	14	2,295	24,303	1,030	10	986	9,998	688
Alabama.......	1				1			
District of Columbia....	-	172	4,351	175	1	617	9,889	329
Pennsylvania..	2				4			
South Carolina	-				1			
Colorado......	-				2			
Kansas........	1	86	2,285	57	-	82	2,462	160
Texas.........	2				3			
Washington....	1				1			
Illinois......	1	73	1,231	222	2	131	2,326	292
Indiana.......	2				1			
Wall coping:								
Illinois......	3	393	5,948	202	4	301	5,055	288
Iowa..........	3	499	8,388	357	3	405	6,229	319
Ohio..........	20	10,739	114,094	2,987	17	6,714	99,533	1,813
Alabama.......	1				1			
Georgia.......	1				1			
Kentucky......	3	6,179	64,885	2,651	2	9,538	78,307	741
North Carolina	2				2			
Pennsylvania..	4				4			
South Carolina	1				1			
Arkansas......	1				-			
California....	1				-			
Colorado......	2				2			
Texas.........	2	1,247	30,655	747	2	340	7,311	386
Utah..........	2				2			
Washington....	1				1			
Wyoming.......	1				1			

#12427

Table 5.—Clay Products (other than Pottery)—Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936 Number of establishments	1936 Production Quantity	1936 Production Value	1936 Stocks on hand Dec. 31	1935 Number of establishments	1935 Production Quantity	1935 Production Value	1935 Stocks on hand Dec. 31
Wall coping (Continued):		Short tons		Short tons		Short tons		Short tons
Indiana	3	714	$8,885	253	2	1,119	$13,368	329
Michigan	1				1			
Kansas	1				1			
Minnesota	1	1,012	16,939	807	1	677	13,194	416
Missouri	4				3			
Segment blocks:								
California	1				-			
Colorado	1				1			
Georgia	-				1			
Illinois	1	11,251	136,977	8,465	1	9,169	105,540	10,845
Minnesota	1				1			
Missouri	2				2			
North Carolina	-				1			
Ohio	4				4			
Fire-clay products: (a) Brick, block, and tile, except high-alumina (9-inch equivalent):		Thousands		Thousands		Thousands		Thousands
Alabama	4	13,549	480,912	2,982	4	10,777	381,590	3,666
California	17	18,741	903,967	32,234	23	15,396	739,750	32,337
Colorado	6	9,154	271,785	2,661	5	6,989	220,433	2,086
Illinois	4	9,566	336,101	3,259	4	9,166	303,667	2,590
Kentucky	10	53,129	2,422,484	19,728	11	33,338	1,541,428	19,066
Maryland	5	18,503	736,517	4,179	5	14,161	551,328	3,514
Missouri	12	122,741	5,741,980	27,958	12	101,650	4,339,023	29,016
New Jersey	9	10,201	509,864	2,512	6	7,569	373,833	2,865
Ohio	29	112,720	3,491,137	34,337	29	72,036	2,502,212	29,435
Pennsylvania	43	216,964	10,191,651	54,307	46	157,936	6,834,023	58,270
Texas	6	6,199	197,418	2,344	4	2,397	68,542	564
Washington	3	3,415	169,740	396	3	3,460	175,647	913
Arkansas	1				1			
Indiana	1	5,100	149,907	1,131	1	2,976	84,103	1,035
Mississippi	-				1			
Tennessee	2				2			
Connecticut	1				1			
Massachusetts	2	2,537	101,383	443	2	2,102	115,556	99
New York	2				2			
Florida	-				1			
Georgia	4				5			
North Carolina	-	11,859	814,699	2,954	2	40,430	1,204,421	6,641
South Carolina	1				1			
West Virginia	2				4			
Idaho	1				1			
Montana	3				2			
Nevada	-				1			
New Mexico	1	1,121	60,436	1,424	2	1,296	60,035	899
North Dakota	1				-			
Oregon	1				1			
Utah	1				1			
(b) High-alumina brick (over 40% Al_2O_3):								
Missouri	9	4,942	591,375	1,848	8	3,894	476,294	2,032
Pennsylvania	4	612	41,546	247	5	776	54,959	512
California	3				7			
Illinois	2	5,597	489,196	2,122	2	8,550	539,776	6,021
Ohio	3				4			
Washington	-				1			

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and Year	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Fire-clay products (Continued):								
(c) Special shapes:		Short tons		Short tons		Short tons		Short tons
California......	7	7,526	$213,363	5,350	14	6,893	$194,390	5,807
Colorado........	4	5,164	92,696	2,793	4	5,085	90,518	2,538
Kentucky........	5	36,475	860,387	9,147	5	24,219	442,556	8,425
Missouri........	8	53,070	1,198,535	33,282	8	34,133	743,967	14,950
Ohio............	10	25,244	407,042	4,651	8	29,969	609,907	5,456
Pennsylvania....	14	69,149	1,444,563	9,850	13	32,046	603,533	9,385
Arkansas........	1				-			
Idaho...........	1				1			
North Dakota....	1	7,871	129,270	1,322	-	6,369	97,335	2,272
Texas...........	-				1			
Utah............	1				-			
Washington......	2				3			
Georgia.........	2				1			
Illinois........	2				2			
Indiana.........	-	17,509	564,239	6,363	1	10,781	267,938	4,988
Maryland........	1				2			
Michigan........	1				1			
West Virginia...	1				-			
Massachusetts...	2				2			
New Jersey......	2	4,783	273,754	1,342	3	6,616	214,585	1,128
New York........	2				3			
(d) Plastic fire-brick:								
Pennsylvania....	5	1,830	41,931	25				
Alabama.........	1							
Arkansas........	1							
Georgia.........	1	13,671	460,982	1,197				
Mississippi.....	1							
Missouri........	5							
South Carolina..	1							
California......	5				(1)	(1)	(1)	(1)
Colorado........	2	1,181	32,628	142				
Washington......	2							
Illinois........	2							
Massachusetts...	1							
Michigan........	1	22,696	563,823	872				
New Jersey......	3							
Ohio............	4							
Wisconsin.......	1							
(e) Ladle brick:		Thousands		Thousands		Thousands		Thousands
Illinois........	2							
Missouri........	1							
Ohio............	1	59,323	1,118,394	5,324	(1)	(1)	(1)	(1)
Pennsylvania....	1							
West Virginia...	2							
Glass-house tank blocks, melting pots, stoppers, floaters, and rings:		Short tons		Short tons		Short tons		Short tons
California......	3	6,492	428,137	3,525	2	5,557	378,075	4,465
Missouri........	2				2			
Indiana.........	3	10,047	1,140,291	3,489	3	9,696	1,136,058	3,871
Kentucky........	1				1			
Ohio............	2	12,939	915,241	9,868	2	12,272	926,980	9,231
Pennsylvania....	3				4			

#12427

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936 Number of establishments	1936 Production Quantity	1936 Production Value	1936 Stocks on hand Dec. 31	1935 Number of establishments	1935 Production Quantity	1935 Production Value	1935 Stocks on hand Dec. 31
Refractory cement:		Short tons		Short tons		Short tons		Short tons
Illinois	5	889	$68,574	94	3	168	$7,902	22
Missouri	7	15,166	663,357	3,224	7	10,575	522,715	1,125
New Jersey	6	5,703	347,724	113	4	4,995	287,349	928
New York	4	253	20,362	29	4	244	18,175	20
Ohio	9	3,110	122,969	199	8	2,321	95,566	102
Pennsylvania	13	8,915	403,080	402	16	7,966	430,934	550
Alabama	1				1			
Georgia	2				2			
Indiana	1				-			
Kentucky	1	4,092	207,170	914	3	7,226	274,618	283
Maryland	3				1			
Massachusetts	-				2			
Michigan	2				2			
Arkansas	1				1			
California	3				5			
Colorado	1	3,328	109,261	101	2	3,410	97,596	201
Montana	2				1			
Texas	1				-			
Washington	2				-			
Clay sold, raw or prepared, including fire-clay dust:								
Alabama	5	6,035	23,870	----	5	3,019	18,707	----
California	18	9,062	79,155	----	20	10,125	67,358	----
Colorado	8	16,599	43,396	----	5	3,274	24,302	----
Iowa	5	2,963	28,783	----	8	4,753	29,825	----
Kentucky	9	12,178	83,679	----	5	4,339	31,137	----
Missouri	12	50,233	349,133	----	13	32,236	214,167	----
New Jersey	8	2,981	23,576	----	5	2,113	17,276	----
Ohio	20	39,908	139,436	----	21	42,879	149,042	----
Pennsylvania	36	81,669	456,268	----	29	53,916	315,878	----
Arkansas	1				1			
Minnesota	1				2			
Nebraska	1	14,647	53,926	----	2	5,570	31,051	----
North Dakota	1				-			
Texas	6				5			
Connecticut	3				2			
Maine	1	1,382	18,860	----	-	1,510	19,836	----
Massachusetts	2				2			
New York	4				3			
Georgia	3				2			
Maryland	4				3			
Mississippi	1				1			
South Carolina	2	2,773	29,553	----	2	2,386	17,553	----
Tennessee	2				1			
Virginia	1				1			
West Virginia	1				1			
Idaho	2				2			
Montana	1				-			
New Mexico	1	3,457	28,546	----	1	3,601	22,496	----
Oregon	1				1			
Utah	3				2			
Washington	4				2			
Illinois	6				7			
Indiana	2	132,457	224,947	----	3	82,949	231,931	----
Michigan	2				2			

#12427

534

Table 5.---Clay Products (other than Pottery)---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 4, above)

Kind and State	1936				1935			
	Number of establishments	Production		Stocks on hand Dec. 31	Number of establishments	Production		Stocks on hand Dec. 31
		Quantity	Value			Quantity	Value	
Other clay products:								
California	5	--------	$40,264	--------	9	--------	$64,208	--------
Illinois	9	--------	370,075	--------	9	--------	330,135	--------
Ohio	11	--------	1,994,719	--------	15	--------	1,235,792	--------
Pennsylvania	16	--------	945,078	--------	15	--------	1,099,144	--------
Alabama	1				-			
Georgia	1				-			
Maryland	2				-			
Mississippi	1	--------	96,283	--------	1	--------	76,845	--------
South Carolina	-				1			
Tennessee	2				1			
Virginia	1				1			
Arkansas	-				1			
Colorado	2				3			
New Mexico	1	--------	169,942	--------	-	--------	164,934	--------
Oklahoma	1				-			
Texas	4				2			
Utah	1				1			
Indiana	2				1			
Iowa	1				1			
Kansas	1				1			
Michigan	-	--------	267,512	--------	1	--------	378,142	--------
Minnesota	-				1			
Missouri	2				3			
Nebraska	-				1			
Wisconsin	-				3			
Maine	-				1			
Massachusetts	1	--------	77,690	--------	1	--------	225,021	--------
New Jersey	4				5			
New York	1				2			

(Values for Alabama–Virginia, Arkansas–Utah, Indiana–Wisconsin, and Maine–New York are combined by braces in each group.)

1/ No data.

#12427

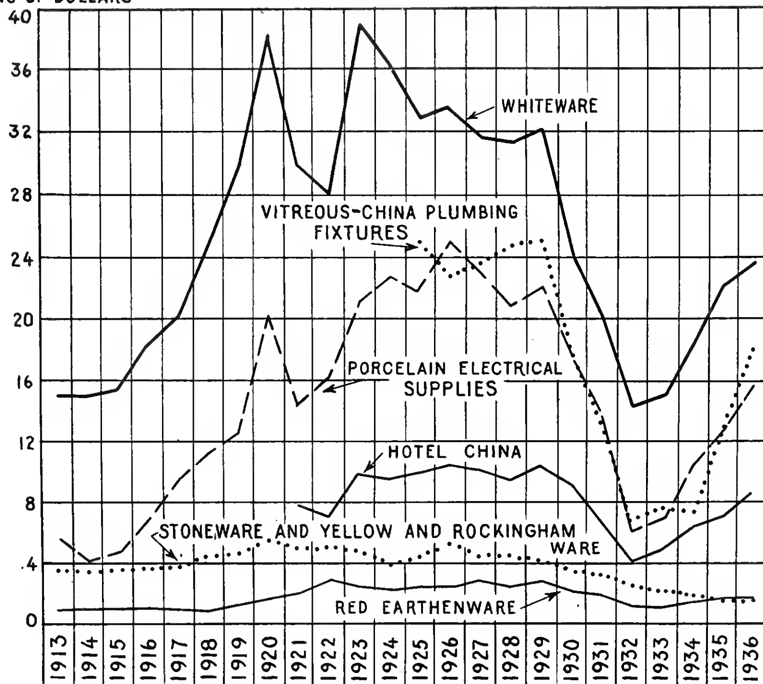


Table 6.—Pottery—Value of Principal Products: 1913 to 1936

Year	Red earthenware	Stoneware (except chemical) and yellow and Rockingham ware	Whiteware, including cream-color, white granite, semiporcelain, and semivitreous porcelain ware	Hotel china	Vitreous-china plumbing fixtures	Porcelain electrical supplies
1936	$1,805,470	$1,637,224	$23,735,469	$8,675,799	$18,052,618	$15,798,134
1935	1,795,144	1,677,232	22,164,328	7,197,700	12,969,481	12,751,034
1934	1,378,936	1,811,052	18,327,364	6,500,751	7,278,619	10,451,126
1933	1,207,396	2,221,696	15,005,178	5,007,669	7,709,353	7,055,580
1932	1,238,109	2,515,578	14,324,712	4,219,926	6,861,047	6,104,028
1931	2,034,299	3,299,270	20,108,359	6,594,495	12,894,277	13,154,077
1930	2,218,580	3,486,417	24,194,055	9,181,677	17,646,927	17,165,419
1929	2,798,161	4,144,056	32,066,498	10,476,285	24,992,047	22,135,474
1928	2,618,078	4,421,091	31,434,506	9,251,243	24,566,102	20,812,337
1927	2,850,428	4,503,079	31,692,083	10,019,528	23,627,594	22,860,678
1926	2,633,909	5,311,123	33,563,570	10,382,279	22,875,604	24,867,688
1925	2,631,867	4,349,317	32,815,622	9,866,975	25,035,715	21,826,971
1924	2,315,199	3,960,789	36,277,578	9,506,330	(1)	22,893,197
1923	2,458,226	4,746,435	38,695,807	9,761,187	(1)	21,248,382
1922	2,993,185	4,958,885	28,080,721	6,965,834	(1)	16,128,913
1921	2,029,941	4,920,378	29,744,343	7,888,191	(1)	14,330,984
1920	1,766,919	5,475,660	38,323,880	(1)	(1)	20,218,924
1919	1,298,311	4,603,018	29,847,261	(1)	(1)	12,614,794
1918	906,861	4,454,164	25,305,926	(1)	(1)	11,194,812
1917	1,065,185	3,865,825	20,920,469	(1)	(1)	9,451,586
1916	1,156,351	3,696,288	18,191,390	(1)	(1)	7,034,420
1915	1,072,061	3,575,603	15,324,242	(1)	(1)	4,671,202
1914	1,059,904	3,349,301	14,968,079	(1)	(1)	4,130,270
1913	1,000,529	3,683,567	15,066,811	(1)	(1)	5,737,741

1/ No data.

#12427

Table 7.—Pottery—Number of Establishments; and Production, by Kind, Quantity, and Value: for the United States: 1936, 1935, and 1934

Kind and Year	Number of establishments (1)	Quantity	Value
TOTAL:			
1936.....	308	———	$81,320,959
1935.....	301	———	68,283,461
1934.....	295	———	52,556,027
Vitreous-china plumbing fixtures (exclusive of fittings):			
Total:			
1936......	38	———	18,052,618
1935......	37	———	12,969,481
1934......	34	———	7,278,619
(a) Bathroom and toilet fixtures:		Number	
Closet bowls:			
Siphon jets:			
1936......	19	135,007	1,095,248
1935......	18	89,460	606,631
1934......	17	73,254	526,206
Washdowns:			
1936......	21	1,108,458	3,970,695
1935......	22	1,019,051	3,245,894
1934......	23	486,384	1,690,840
Reverse traps:			
1936......	16	215,619	1,178,947
1935......	17	151,198	706,368
1934......	17	60,027	290,380
Flush tanks:			
Lowdown (large and small):			
1936......	22	1,226,503	5,512,632
1935......	21	1,072,267	4,233,516
1934......	24	515,175	2,221,780
All other:			
1936......	7	7,508	36,886
1935......	5	4,812	20,516
1934......	6	2,932	24,618
Lavatories:			
1936......	17	236,199	2,424,243
1935......	16	157,710	1,613,114
1934......	17	93,366	1,028,606
Stalls:			
1936......	13	33,504	847,315
1935......	11	17,432	465,627
1934......	(2)	(2)	(2)
Other bathroom and toilet fixtures:			
1936......	22	———	1,912,809
1935......	22	———	1,481,421
1934......	21	———	1,139,853
(b) Other vitreous-china fixtures:			
1936......	15	———	1,073,843
1935......	15	———	596,394
1934......	13	———	356,336

Kind and Year	Number of establishments (1)	Quantity	Value
Semivitreous or porcelain (all-clay) plumbing fixtures (exclusive of fittings):			
Total:			
1936.......	5	———	$442,078
1935.......	6	———	513,195
1934.......	10	———	451,216
(a) Laundry tubs and kitchen sinks:		Number	
1936.......	4	24,227	254,186
1935.......	3	(3)	(3)
1934.......	3	13,770	121,944
(b) Other semivitreous fixtures:			
1936.......	5	———	187,892
1935.......	6	———	(3)
1934.......	9	———	329,272
Pyrometric cones:			
1936.......	3	7,969,720	60,362
1935.......	(2)	(2)	(2)
1934.......	(2)	(2)	(2)
Red earthenware:			
1936.......	87	———	1,805,470
1935.......	76	———	1,795,144
1934.......	85	———	1,378,936
Stoneware (except chemical) and yellow and Rockingham ware:			
1936.......	59	———	1,637,224
1935.......	55	———	1,677,232
1934.......	59	———	1,811,052
Chemical stoneware:			
1936.......	5	———	1,038,201
1935.......	5	———	617,042
1934.......	5	———	615,179
White ware, including cream color, white granite, semiporcelain, and semivitreous porcelain ware:			
1936.......	37	———	23,735,469
1935.......	41	———	22,164,328
1934.......	41	———	18,327,364

#12427

Table 7.—Pottery—Number of Establishments; and Production, by Kind, Quantity, and Value; for the United States: 1936, 1935, and 1934 (Continued)

Kind and Year	Number of establishments (1)	Quantity	Value
Hotel china:			
1936......	20	———	$8,675,799
1935......	23	———	7,197,700
1934......	22	———	6,500,751
Porcelain electrical supplies:			
Total:			
1936......	47	———	4/15,798,134
1935......	47	———	4/12,751,034
1934......	46	———	10,451,126
(a) Insulators:			
Total:			
1936......	20	———	4,515,064
1935......	22	———	3,708,315
1934......	17	———	3,020,562
Pin type:			
Up to, but not including, 7,500 volts:			
1936......	13	———	460,889
1935......	16	———	642,347
1934......	12	———	279,507
7,500 volts to, but not including, 17,000 volts:			
1936......	11	———	270,901
1935......	11	———	202,265
1934......	11	———	153,302
17,000 volts to, but not including, 45,000 volts:			
1936......	11	———	478,754
1935......	11	———	350,917
1934......	10	———	233,807
45,000 volts and over:			
1936......	11	———	523,397
1935......	11	———	353,401
1934......	10	———	240,432
Suspension type:			
1936......	12	———	1,733,424
1935......	11	———	910,131
1934......	11	———	1,630,926
Knobs, tubes, and cleats:			
1936......	11	———	1,047,699
1935......	15	———	1,249,254
1934......	9	———	482,588
Porcelain electrical supplies (Continued):			
(b) Other electrical supplies:			
1936....	42	———	$11,283,070
1935....	36	———	9,042,719
1934....	42	———	7,430,564
Garden pottery:			
1936....	20	———	249,896
1935....	20	———	397,662
1934....	14	———	94,382
Art pottery:			
1936....	65	———	3,135,112
1935....	63	———	2,662,407
1934....	52	———	1,846,325
Gas and electric logs:			
1936....	4	———	46,687
1935....	4	———	(3)
1934....	7	———	(3)
Gas radiants and back-walls used in portable stoves:			
1936....	5	———	682,580
1935....	6	———	428,300
1934....	(2)	———	(2)
Saggers:			
1936....	47	———	316,898
1935....	49	———	424,064
1934....	50	———	356,485
Other pottery products:			
1936....	45	———	5,644,431
1935....	53	———	4,685,872
1934....	34	———	3,444,592

1/ The totals in this column do not equal the sums of the individual items, for the reason that in some cases two or more of the products named are manufactured by the same establishment.

2/ No data.

3/ Withheld to avoid disclosing approximations of data for individual establishments; value included in figure for "Other pottery products."

4/ Includes value of metal fittings, as follows: 1936, $1,051,891; 1935, $1,039,435.

#12427

Table 8.---Pottery---Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935
(For totals for United States, see Table 7, above)

Kind and State	1936 Number of establishments	1936 Quantity	1936 Value	1935 Number of establishments	1935 Quantity	1935 Value
Vitreous-china plumbing fixtures (exclusive of fittings):		Number			Number	
(a) Bathroom and toilet fixtures:						
Closet bowls:						
Siphon jets:						
California......	2			2		
Illinois........	3	37,279	$295,863	3	24,286	$166,195
Indiana.........	2			2		
Wisconsin.......	1			1		
New Jersey......	5			4		
Ohio............	2	97,728	799,385	2	65,174	440,436
Pennsylvania....	2			2		
West Virginia...	2			2		
Washdowns:						
Illinois........	3	91,200	271,158	3	73,261	233,433
New Jersey......	7	271,017	1,037,605	7	262,011	860,656
California......	2			2		
Indiana.........	2	356,584	1,303,693	2	375,195	1,203,307
Wisconsin.......	1			1		
Maryland........	-			1		
Ohio............	3	389,657	1,358,239	3	308,584	948,498
Pennsylvania....	2			2		
West Virginia...	1			1		
Reverse traps:						
California......	2			2		
Illinois........	3	117,511	609,189	3	63,805	320,748
Indiana.........	1			2		
Wisconsin.......	1			1		
New Jersey......	3			4		
Ohio............	3	98,108	569,758	2	87,393	385,620
Pennsylvania....	2			2		
West Virginia...	1			1		
Flush tanks:						
Lowdown (large and small):						
Illinois........	3	114,164	452,447	3	97,670	465,270
New Jersey......	7	271,314	1,224,476	6	243,741	938,068
California......	2			2		
Indiana.........	2	428,714	1,996,384	2	377,340	1,603,977
Wisconsin.......	1			1		
Maryland........	1			1		
Ohio............	3	412,311	1,839,325	3	353,516	1,226,201
Pennsylvania....	2			2		
West Virginia...	1			1		
All other:						
California......	1			1		
New Jersey......	3	7,508	36,886	3	4,812	20,516
Ohio............	2			1		
Pennsylvania....	1			-		
Lavatories:						
California......	2			2		
Illinois........	3	81,295	803,818	3	51,603	581,675
Indiana.........	1			1		
Wisconsin.......	1			1		
New Jersey......	5			5		
Ohio............	2	154,904	1,620,425	2	106,107	1,031,439
Pennsylvania....	2			2		
West Virginia...	1			-		

#12427

Table 8.—Pottery—Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 7, above)

Kind and State	1936 Number of establishments	1936 Quantity	1936 Value	1935 Number of establishments	1935 Quantity	1935 Value
(a) Bathroom and toilet fixtures (Continued)		Number			Number	
Stalls:						
New Jersey	5	16,475	$400,894	3		
California	2			2		
Illinois	1			1		
Indiana	1	17,029	446,421	1	17,422	$465,627
Ohio	2			2		
Pennsylvania	1			1		
Wisconsin	1			1		
Other bathroom and toilet fixtures:						
New Jersey	10	------	1,026,006	11	------	875,870
California	5			3		
Illinois	1			1		
Indiana	1			1		
Ohio	2	------	886,803	2	------	605,551
Pennsylvania	2			2		
West Virginia	-			1		
Wisconsin	1			1		
(b) Other vitreous-china fixtures:						
New Jersey	8	------	792,050	7	------	362,645
California	1			2		
Illinois	2			2		
Indiana	1			1		
Ohio	1	------	281,793	1	------	233,749
Pennsylvania	1			1		
West Virginia	-			1		
Wisconsin	1			-		
Semivitreous or porcelain (all-clay) plumbing fixtures (exclusive of fittings):						
(a) Laundry tubs and kitchen sinks:						
New Jersey	3	24,227	254,186	2	(1)	(1)
Pennsylvania	1			1		
(b) Other semivitreous fixtures:						
New Jersey	3	------	187,892	4	------	(1)
Pennsylvania	2			2		
Pyrometric cones:						
Ohio	2	7,969,720	60,362	(2)	(2)	(2)
West Virginia	1			(2)		
Red earthenware:						
California	6	------	128,162	7	------	104,820
Georgia	8	------	11,680	3	------	7,300
Illinois	4	------	159,598	4	------	151,852
New Jersey	4	------	73,383	5	------	76,860
New York	4	------	115,187	4	------	110,640
Ohio	10	------	207,415	11	------	327,486
Pennsylvania	6	------	396,842	6	------	370,098
Texas	5	------	39,334	3	------	30,840

#12427

Table 8.---Pottery---Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 7, above)

Kind and State	1936 Number of establishments	1936 Quantity	1936 Value	1935 Number of establishments	1935 Quantity	1935 Value
Red earthenware (Continued):						
Alabama	2			2		
Florida	1			2		
Kentucky	1	-------	$66,698	1	-------	$57,499
Mississippi	2			-		
Tennessee	1			1		
Colorado	1			1		
Oregon	2	-------	52,607	1	-------	40,566
Utah	1			1		
Washington	3			2		
Connecticut	2			2		
District of Columbia	1	-------	333,248	1	-------	290,176
Maryland	1			1		
Massachusetts	1			1		
Indiana	2			1		
Michigan	2	-------	111,529	2	-------	113,224
Wisconsin	2			1		
Iowa	1			1		
Kansas	1			1		
Minnesota	1	-------	87,245	1	-------	89,438
Missouri	3			2		
Nebraska	1			1		
North Carolina	3			3		
South Carolina	3	-------	22,542	2	-------	24,345
Virginia	2			2		
Stoneware (except chemical) and yellow and Rockingham ware:						
Alabama	3	-------	3,240	-	-------	------
California	5	-------	103,501	6	-------	107,477
Mississippi	5	-------	6,141	7	-------	12,550
Ohio	10	-------	547,894	13	-------	620,502
Texas	5	-------	51,525	4	-------	50,670
Arkansas	2			1		
Kentucky	3	-------	100,507	3	-------	68,602
Tennessee	1			-		
Florida	-			1		
Georgia	5	-------	7,585	2	-------	9,175
North Carolina	3			2		
South Carolina	2			1		
Illinois	4			4		
Minnesota	1	-------	532,159	1	-------	541,036
Missouri	1			-		
Indiana	3			3		
Massachusetts	1	-------	239,593	1	-------	214,190
Pennsylvania	2			2		
West Virginia	-			1		
Kansas	1			1		
Oregon	1	-------	45,079	1	-------	53,030
Washington	1			1		

Values for bracketed groups of States are combined totals for the group.

#12427

Table 8.--Pottery--Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 7, above)

Kind and State	1936 Number of establishments	1936 Quantity	1936 Value	1935 Number of establishments	1935 Quantity	1935 Value
Chemical stoneware:						
Massachusetts...	1			1		
New Jersey......	1	------	$1,038,201	1	------	$617,042
Ohio............	2			2		
Tennessee.......	1			1		
White ware, including cream color, white granite, semiporcelain, and semivitreous porcelain ware:						
California......	5	-------	1,377,117	4	-------	781,996
Ohio............	16	-------	8,012,085	18	-------	8,527,183
West Virginia...	6	-------	9,358,961	7	-------	8,801,450
Colorado........	1			1		
Illinois........	1			1		
Indiana.........	1			1		
Maryland........	-			1		
Michigan........	1	-------	4,987,306	1	-------	4,053,699
New Jersey......	-			1		
New York........	2			2		
Pennsylvania....	2			2		
Tennessee.......	1			1		
Virginia........	1			1		
Hotel china:						
Ohio............	5	-------	1,073,079	7	-------	904,649
Pennsylvania....	3	-------	2,212,463	3	-------	1,767,525
West Virginia...	4	-------	1,361,901	4	-------	1,206,459
California......	2			2		
Colorado........	1	-------	4,028,356	1	-------	3,319,067
New Jersey......	1			2		
New York........	4			4		
Porcelain electrical supplies:						
(a) Insulators:						
Pin type:						
Up to, but not including, 7,500 volts:						
California......	2			2		
Connecticut.....	1			1		
Illinois........	1			1		
Maryland........	1			1		
New Jersey......	-	-------	460,889	2	-------	642,347
New York........	3			2		
Ohio............	2			3		
Pennsylvania....	1			1		
Tennessee.......	1			1		
West Virginia...	1			2		
7,500 volts to, but not including, 17,000 volts:						
California......	1			1		
Connecticut.....	1			1		
Illinois........	1			1		
Maryland........	1	-------	270,901	1	-------	202,265
New York........	3			2		
Ohio............	2			2		
Pennsylvania....	-			1		
West Virginia...	2			2		

#12427

Table 8.—Pottery—Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 7, above)

Kind and State	1936 Number of establishments	1936 Quantity	1936 Value	1935 Number of establishments	1935 Quantity	1935 Value
(a) Insulators (Continued):						
Pin type (Continued):						
17,000 volts to, but not including, 45,000 volts:						
California....	1			1		
Connecticut...	1			1		
Illinois......	1			1		
Maryland......	1	-------	$478,754	1	-------	$350,917
New York......	3			2		
Ohio..........	2			2		
Pennsylvania..	-			1		
West Virginia.	2			2		
45,000 volts and over:						
California....	1			1		
Connecticut...	1			1		
Illinois......	1			1		
Maryland......	1	-------	523,397	1	-------	353,401
New York......	3			2		
Ohio..........	2			2		
Pennsylvania..	-			1		
West Virginia.	2			2		
Suspension type:						
California....	1			1		
Connecticut...	1			1		
Illinois......	1			1		
Maryland......	1	-------	1,733,424	1	-------	910,131
New York......	3			2		
Ohio..........	2			3		
Pennsylvania..	1			1		
West Virginia.	2			1		
Knobs, tubes, and cleats:						
California....	-			2		
Connecticut...	1			1		
Illinois......	1			1		
New Jersey....	1			1		
New York......	-	-------	1,047,699	1	-------	1,249,254
Ohio..........	4			3		
Pennsylvania..	-			1		
Tennessee.....	1			1		
West Virginia.	3			4		
(b) Other electrical supplies:						
New Jersey....	14	-------	3,368,953	9	-------	2,066,504
Ohio..........	5	-------	1,583,654	6	-------	1,219,677
California....	4	-------	590,576	3	-------	559,055
Tennessee.....	1			1		
Connecticut...	1	-------	728,547	1	-------	1,273,669
New York......	3			3		
Illinois......	1			1		
Indiana.......	1	-------	2,256,031	1	-------	1,794,613
Michigan......	1			1		
Wisconsin.....	1			1		
Maryland......	1			1		
Pennsylvania..	5	-------	2,755,309	5	-------	2,129,201
West Virginia.	4			3		

#12427

Table 8.---Pottery---Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 7, above)

Kind and State	1936 Number of establishments	1936 Quantity	1936 Value	1935 Number of establishments	1935 Quantity	1935 Value
Garden pottery:						
Ohio	6	-------	$101,689	6	-------	$150,973
Alabama	1			1		
Arkansas	-			1		
California	4			5		
Florida	1			2		
Georgia	2			-		
Illinois	-	-------	148,207	1	-------	246,689
Iowa	2			1		
Kentucky	-			1		
North Carolina	-			1		
Pennsylvania	1			-		
Texas	2			1		
Washington	1			-		
Art pottery:						
California	11	-------	764,733	15	-------	830,720
Georgia	5	-------	3,875	-	-------	-------
Ohio	11	-------	1,210,970	13	-------	861,714
Alabama	2			1		
Arkansas	2			3		
Florida	-			1		
Kentucky	3	-------	189,599	2	-------	208,243
Mississippi	2			-		
North Carolina	6			5		
West Virginia	2			1		
Colorado	2			1		
Oklahoma	1			1		
Oregon	-			1		
South Dakota	1	-------	71,229	-	-------	40,016
Texas	2			2		
Washington	2			1		
Illinois	3			2		
Indiana	1			1		
Iowa	1			3		
Michigan	1	-------	573,144	2	-------	383,768
Minnesota	1			1		
Wisconsin	1			1		
Massachusetts	1			-		
New Jersey	2	-------	321,562	3	-------	337,946
New York	1			1		
Pennsylvania	1			2		
Gas and electric logs:						
Illinois	1			1		
Kentucky	1			1		
New Jersey	1	-------	46,687	1	-------	(3)
Pennsylvania	1			1		
Gas radiants and backwalls used in portable stoves:						
Alabama	1			1		
California	-			1		
New Jersey	1	-------	682,580	1	-------	428,300
Ohio	3			3		

#12427

544

Table 8.---Pottery---Number of Establishments; and Production, by Kind, Quantity, and Value; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 7, above)

Kind and State	1936			1935		
	Number of establishments	Quantity	Value	Number of establishments	Quantity	Value
Saggers:						
California	4	-------	$5,329	3	-------	$15,582
New Jersey	7	-------	23,676	9	-------	44,482
New York	3	-------	52,350	4	-------	50,272
Ohio	15	-------	91,765	13	-------	105,685
Pennsylvania	4	-------	32,461	5	-------	54,579
Colorado	1			1		
Florida	-			1		
Georgia	1			-		
Illinois	3			3		
Indiana	2			2		
Kentucky	1	-------	111,317	2	-------	153,464
Maryland	-			1		
Michigan	2			1		
Mississippi	1			-		
North Carolina	1			-		
West Virginia	2			4		
Other pottery products:						
California	3	-------	394,723	4	-------	258,529
New Jersey	8	-------	1,111,804	9	-------	930,239
Ohio	14	-------	2,974,895	15	-------	2,591,862
Alabama	2			1		
Colorado	2			2		
Connecticut	1			1		
Florida	-			2		
Georgia	4			-		
Illinois	2			2		
Indiana	-			1		
Kentucky	-			1		
Louisiana	1			1		
Maryland	1	-------	1,163,009	1	-------	905,242
Michigan	1			1		
Mississippi	1			1		
New York	-			1		
North Carolina	-			1		
Pennsylvania	2			3		
Tennessee	1			1		
Texas	2			2		
Washington	-			2		
West Virginia	-			1		

1/ Withheld to avoid disclosing approximations of data for individual establishments.

2/ No data.

3/ Withheld to avoid disclosing approximations of data for individual establishments; included in figures for "Other pottery products."

#12427

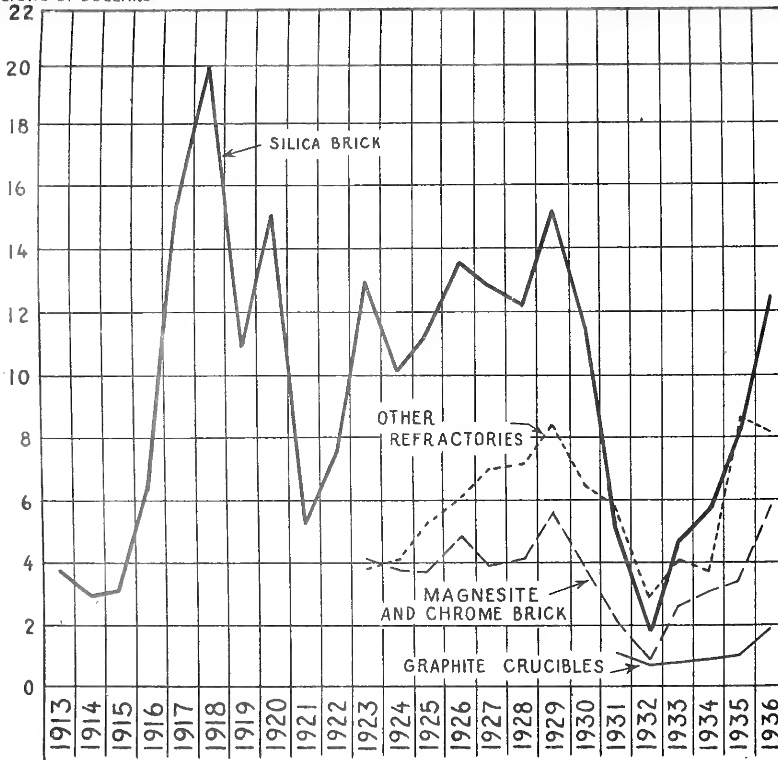


Table 9.—Nonclay Refractories—Value of Products, 1913 to 1936

Year	Silica brick	Magnesite and chrome brick	Graphite crucibles	Other refractories (including those of alumina and silicon carbide; cement, etc.)
1936	$12,453,330	$5,767,221	$1,880,921	$8,243,245
1935	8,179,990	3,424,726	1,035,644	8,649,872
1934	5,705,244	3,091,573	870,855	3,766,155
1933	4,654,776	2,579,994	757,996	4,076,751
1932	1,762,440	845,332	639,207	2,857,758
1931	5,131,514	2,233,810	1,113,972	5,688,816
1930	11,523,169	3,878,054	(1)	6,356,847
1929	15,165,260	5,630,647	2,751,736	8,409,990
1928	12,187,539	4,143,823	(1)	7,087,488
1927	12,756,994	3,874,176	1,808,934	6,916,431
1926	13,614,033	4,762,645	(1)	6,128,841
1925	11,280,127	3,751,872	2,016,261	5,332,432
1924	10,084,373	3,832,857	(1)	4,113,391
1923	12,855,067	4,060,142	(1)	3,778,850
1922	7,533,409	(1)	(1)	(1)
1921	5,220,640	(1)	(1)	(1)
1920	15,076,821	(1)	(1)	(1)
1919	10,914,898	(1)	(1)	(1)
1918	19,987,803	(1)	(1)	(1)
1917	15,510,595	(1)	(1)	(1)
1916	6,369,256	(1)	(1)	(1)
1915	3,039,869	(1)	(1)	(1)
1914	2,951,525	(1)	(1)	(1)
1913	3,815,806	(1)	(1)	(1)

1/ No data (see text, page I).

-12427

Table 10.---Nonclay Refractories---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; for the United States: 1936, 1935, and 1934

Kind and Year	Number of establishments 1/	Production: Quantity	Production: Value	Stocks on hand, Dec. 31
Total:				
1936	45	--------	$28,344,717	--------
1935	51	--------	21,290,232	--------
1934	40	--------	13,433,827	--------
		Thousands		Thousands
Magnesite and chrome brick:				
1936	3	20,403	5,767,221	2,791
1935	3	12,112	3,424,726	3,228
1934	4	10,640	3,091,573	3,336
Silica brick:				
1936	25	229,325	12,453,330	59,498
1935	24	149,621	8,179,990	55,645
1934	28	103,534	5,705,244	41,998
Refractory cement (nonclay):		Short tons		Short tons
1936	24	54,948	1,132,556	729
1935	25	39,287	944,155	247
1934	23	40,853	1,070,122	1,323
Graphite and other carbon:				
(a) Crucibles and retorts:				
1936	9	--------	1,880,921	--------
1935	10	--------	1,035,644	--------
1934	10	--------	870,855	--------
(b) Other:				
1936	4	--------	260,227	--------
1935	6	--------	452,095	--------
1934	(2)	--------	(2)	--------
Silicon carbide, brick and other forms:				
1936	11	--------	1,716,676	--------
1935	8	--------	(3)	--------
1934	(2)	--------	(2)	--------
Other nonclay refractories:				
1936	20	--------	5,133,786	--------
1935	26	--------	7,253,622	--------
1934	25	--------	2,696,033	--------

1/ The totals in this column do not equal the sums of the individual items, for the reason that in some cases two or more of the products named are manufactured by the same establishment.

2/ No data.

3/ Withheld to avoid disclosing approximations of data for individual establishments; value included in figure for "Other nonclay refractories."

Table 11.---Nonclay Refractories---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935
(For totals for United States, see Table 10, above)

Kind and State	1936: Number of establishments	1936: Production: Quantity	1936: Production: Value	1936: Stocks on hand, Dec. 31	1935: Number of establishments	1935: Production: Quantity	1935: Production: Value	1935: Stocks on hand, Dec. 31
Magnesite and chrome brick:		Thousands		Thousands		Thousands		Thousands
Maryland	1	20,403	$5,767,221	2,791	1	12,112	$3,424,726	3,228
Pennsylvania	2				2			
Silica brick:								
Pennsylvania	13	148,856	7,619,493	36,622	12	97,395	4,988,693	36,945
Alabama	1	70,594	4,338,787	19,529	1	45,102	2,792,904	15,568
Illinois	2				2			
Indiana	1				1			
Ohio	2				2			
California	2	6,846	346,695	1,753	2	4,648	277,272	1,426
Utah	1				1			
Colorado	2	3,029	148,355	1,594	2	2,476	121,121	1,706
Montana	1				1			

#12427

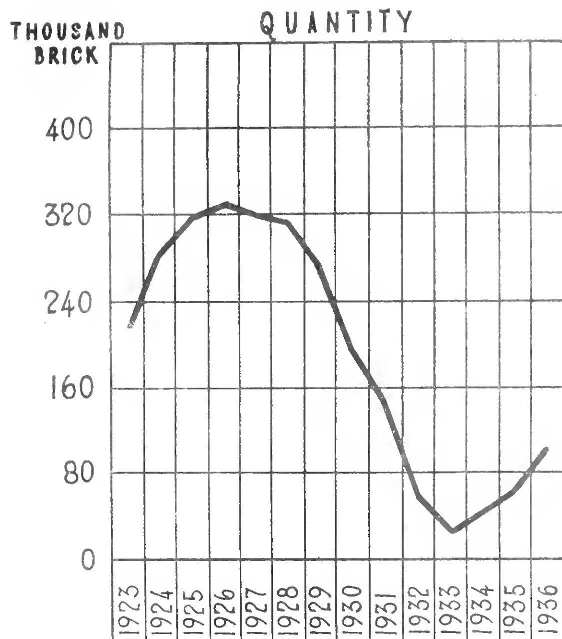
Table 11.---Nonclay Refractories---Number of Establishments; Production, by Kind, Quantity, and Value; and Stocks on Hand; by States: 1936 and 1935 (Continued)
(For totals for United States, see Table 10, above)

Kind and State	1936 Number of establishments	1936 Production Quantity	1936 Production Value	1936 Stocks on hand, Dec. 31	1935 Number of establishments	1935 Production Quantity	1935 Production Value	1935 Stocks on hand, Dec. 31
Refractory cement (nonclay):		Short tons		Short tons		Short tons		Short tons
Pennsylvania	9	25,761	$502,043	40	11	18,296	$413,767	174
Alabama	2				1			
California	1	1,496	21,596	4	1			
Montana	1				1	11,078	92,925	2
Illinois	2	14,375	136,447	29	1			
Indiana	1				1			
Maryland	1				1			
New Jersey	3	7,671	421,033	633	2	5,779	369,865	71
New York	1				2			
Michigan	1	5,645	51,437	23	3	4,134	67,598	---
Ohio	2				1			
Graphite and other carbon:								
(a) Crucibles and retorts:								
Pennsylvania	4	----	772,521	---	4	----	373,653	---
Connecticut	1				1			
Massachusetts	1	----	1,108,400	---	1	----	661,991	---
New Jersey	2				3			
New York	1				1			
(b) Other carbon refractories:								
Connecticut	1				-			
New Jersey	-	----	260,227	---	2	----	452,095	---
New York	1				1			
Pennsylvania	2				3			
Silicon carbide, brick and other forms:								
Pennsylvania	4	----	197,515	---	3	----	(1)	---
Massachusetts	1				-			
New Jersey	2	----	1,519,161	---	1	----	(1)	---
New York	2				2			
Ohio	2				2			
Other nonclay refractories:								
Pennsylvania	8	----	3,239,587	---	8	----	3,577,691	---
Alabama	-				1			
California	1				1			
Connecticut	-				1			
Illinois	1				-			
Maryland	-				1			
Massachusetts	2	----	1,894,199	---	1	----	3,675,931	---
Michigan	2				1			
Minnesota	-				1			
Montana	1				-			
New Jersey	1				3			
New York	1				2			
Ohio	2				5			
Utah	1				-			
West Virginia	-				1			

1/ See note 3, Table 10, above.

#18427

PRODUCTION, 1923 TO 1936



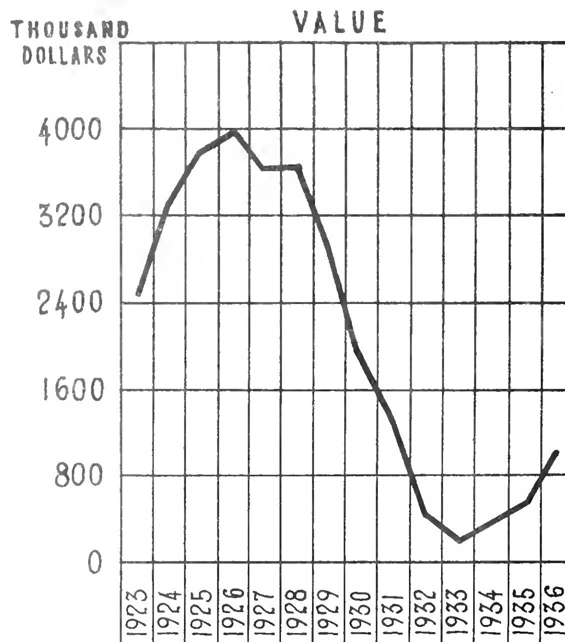


Table 12.---Sand-Lime Brick---Production, by Quantity and Value: 1923 to 1936

Year	Quantity (Thousands)	Value	Year	Quantity (Thousands)	Value
1936	103,189	$922,662	1929	269,584	$2,909,635
1935	61,757	554,631	1928	313,553	3,654,590
1934	41,408	355,560	1927	319,618	3,645,842
1933	22,904	195,318	1926	330,586	3,981,492
1932	52,853	433,118	1925	315,595	3,780,639
1931	143,673	1,236,825	1924	283,417	3,334,503
1930	191,193	1,950,709	1923	213,425	2,471,536

#12427

Table 13.---Sand-Lime Brick---Number of Establishments; Production, by Quantity and Value; and Stocks on Hand; for the United States, 1936, 1935, and 1934, and for States, 1936 and 1935

State and Year	Number of establishments (1)	Production		Stocks on hand December 31 (Thousands)
		Quantity (Thousands)	Value	
United States				
1936	23	103,189	2/ $922,662	6,390
1935	20	61,757	2/ 554,631	9,151
1934	16	41,408	2/ 355,560	4,781
States				
Michigan:				
1936	5	25,191	226,651	1,271
1935	4	10,684	91,409	1,072
Arizona, South Dakota, Texas, Washington:				
1936	3/ 4	3,335	36,114	305
1935	3/ 3	2,296	24,518	254
Florida, Massachusetts, New Jersey, New York, Pennsylvania:				
1936	4/ 6	52,747	454,324	1,798
1935	4/ 7	38,345	335,992	2,070
Illinois, Indiana, Missouri, Ohio:				
1936	5/ 4	6,265	59,153	686
1935	5/ 3	3,675	38,063	3,083
Minnesota, Wisconsin:				
1936	6/ 4	15,651	146,420	2,330
1935	6/ 3	6,757	64,649	2,672

1/ Does not include establishments whose production was valued at less than $5,000.

2/ Not including values of products other than sand-lime brick (not normally belonging to the industry), as follows: 1936, $185,483; 1935, $99,438; 1934, $53,600.

3/ 1936: Arizona, 1 establishment; South Dakota, 1; Texas, 1; Washington, 1. 1935: Arizona, 1 establishment; South Dakota, 1; Texas, 1; Washington, 0.

4/ 1936: Florida, 1 establishment; Massachusetts, 2; New Jersey, 1; New York, 2; Pennsylvania, 0. 1935: Florida, 1 establishment; Massachusetts, 2; New Jersey, 1; New York, 2; Pennsylvania, 1.

5/ 1936: Illinois, 1 establishment; Indiana, 1; Missouri, 1; Ohio, 1. 1935: Illinois, 1 establishment; Indiana, 1; Missouri, 0; Ohio, 1.

6/ 1936: Minnesota, 2 establishments; Wisconsin, 2. 1935: Minnesota, 2 establishments; Wisconsin, 1.

#12427

(Testimony of Henry Pressing.)

Q. (By Mr. Howlett) I would like to have you examine that exhibit, Mr. Pressing. Does that show the production in tons of the various clay manufacturers of the United States?

A. Well, it shows it in tons in some items, and in thousands in others. It has it in accordance with the product. If it is possible to have it in thousands, they have it in thousands; if not, they have it in tonnage basis.

Trial Examiner Stephenson: Thousands of what?

The Witness: Thousands of units, probably bricks.

Q. (By Mr. Howlett) That shows the production of the various clay products manufactured within the United States, in- [812] cluding those within the State of California? A. Yes, sir.

Cross Examination [813]

Q. (By Mr. Mauritsen) Mr. Pressing, referring to Respondent's Exhibit 6, which is headed "Value of Sales of All Products Delivered by Company to Destinations outside the State of California," how did you determine that these products were delivered outside of California?

A. Determined by the order we received from the purchaser, and the signed ticket and receipt.

Q. Referring to Board's Exhibit 11 and Board's Exhibit 12, did the orders which you received indicate that these products were going out of the State? A. They did. [814]

(Testimony of Henry Pressing.)

Q. (By Mr. Howlett) Do you have any knowledge as to whether these products shown on Board's Exhibits 11 and 12 actually went out of the State?

A. No. [815]

W. C. REORDAN

called as a witness by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner Stephenson: State your name, please.

The Witness: W. C. Reordan; R-e-o-r-d-a-n.

Direct Examination

Q. (By Mr. Howlett) By whom are you employed?

A. Los Angeles Brick and Clay Products.

Q. In what capacity? A. Sales manager.

Q. How long have you been employed with that company as sales manager? A. 20 years.

Q. As sales manager, do you have any knowledge as to what industry the greatest portion of your sales are made to?

A. Building and construction industry.

Q. Do you make a study of the trend of building and construction?

A. Yes. We try to keep up with what is coming and what we can expect. We have a man employed

(Testimony of W. C. Reordan.)

for that purpose—to visit the architects and contractors, and see what we can contemplate.

Q. Did you make such a study during the months of March, April and May, 1937? [816]

A. Yes, we did.

Q. What were your findings?

A. We found from the architects that they had very little in the office to carry us over for a period of years—I mean, a period of months; but that things they had in the office were beginning to clean up a little.

Q. Are you familiar with the stock orders and manufacturing orders that come into the company?

A. Yes.

Q. Have you ever prepared a statement for the months of April, May and June, 1937, as to what those orders consisted of?

A. Yes, I did prepare such a statement.

Q. I will show you a statement and ask you if that is such a statement, the statement that you have just referred to? A. Yes, that is.

Mr. Howlett: We wish to offer in evidence Respondent's Exhibit No. 11.

Trial Examiner Stephenson: It being the document just testified to.

Mr. Howlett: Just testified to.

Trial Examiner Stephenson: Any objection?

Mr. Mauritsen: No objection.

(Testimony of W. C. Reordan.)

Trial Examiner Stephenson: The same will be received in evidence and marked as Respondent's Exhibit No. 11. [817]

(Thereupon the document above referred to was received in evidence and marked as Respondent's Exhibit No. 11.)

RESPONDENT'S EXHIBIT NO. 11

All Orders Taken During
April, May & June, 1937

Stock Orders

Month	Tonnage
April	2,559.077 Tons
May	711.116 "
June	691.98 "

Manufacturing Orders

April	None
May	None
June	None

[Endorsed]: 1-10-38. Respondent's Exhibit No. 11.

Q. (By Mr. Howlett) Do you have before you, Mr. Reordan, Respondent's Exhibit No. 11?

A. Yes.

Q. It shows that under "Stock Orders," in April the tonnage was 2,559.077 tons, is that correct?

A. Yes, sir.

(Testimony of W. C. Reordan.)

Q. And in May, 711.116 tons; and in June, 691.98 tons. It also shows the manufacturing orders were in April, May and June, none.

Will you please state what you mean by "stock orders"?

A. Stock orders, we term as orders taken for materials in stock—that is, delivered out of stock, and any orders that we can deliver right out of the stock items.

Q. What do you mean by "manufacturing orders"?

A. Any order for special colors and kinds that we do not carry in stock at all times. [818]

Q. At any time prior to, during, or after the strike, were you prevented from making any shipments, intra or interstate, by reason of the labor difficulties or the strike? A. No.

Q. Does your company have any regularly appointed sales agency outside the State of California? A. No.

Q. Does your company have any regularly appointed dealers outside the State of California?

A. No.

Q. Does your company have any established district points outside the State of California?

A. No.

Q. Does your company do any national advertising? A. None.

(Testimony of W. C. Reordan.)

Q. Does your company have any traveling salesmen who cover territories outside the State of California? A. None.

Q. Does your company own or operate trucks that deliver products outside the State of California? A. No.

Q. Going back to the time in March, April and May, you testified that sales were dropping. Are you familiar with [820] the inventories of the company? A. Yes.

Q. Do you know how you handled your business at that time?

A. Well, we talked it over between us to see—that is one of our principal functions—to keep down the inventories as much as possible, and do business on as small a capital as possible.

Q. What was actually done in this case?

A. We talked it over and decided to slow down as much as possible.

Q. Did you do that?

A. Yes, only make the materials that were absolutely necessary to keep the stocks up.

Cross Examination [821]

Q. Just where do your salesmen operate, Mr. Reordan?

A. I would say in and around Southern California, within a radius of not over a hundred to one hundred and twenty-five miles. We don't go above Bakersfield; we go to San Diego. [823]

Trial Examiner Stephenson: At the opening of the proceedings, the Respondent filed a notice of special appearance and a motion to dismiss the complaint for lack of jurisdiction on the part of the Board. The Trial Examiner reserved his ruling on the motion to dismiss. At this time, all the evidence having been introduced relative to the jurisdictional facts, the motion to dismiss the complaint for lack of jurisdiction of the Board will be denied. The record now, gentlemen, will be closed. [828]

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 9218

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOS ANGELES BRICK & CLAY PRODUCTS COMPANY,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board by its Secretary, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board, Series 1, as amended, hereby certifies that the documents annexed hereto constitute a full

and accurate transcript of the entire record in a proceeding had before said Board entitled, "In the Matter of Los Angeles Brick & Clay Products Company and Alberhill Clay Products Workers' Union No. 373," the same being Case No. C-589 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Charge filed by Alberhill Clay Workers Union Mine, Mill and Smelter Workers, sworn to June 15, 1937.

2. Amended charge filed by Alberhill Clay Products Workers Union, No. 373, sworn to December 5, 1937.

3. Complaint and notice of hearing issued by the National Labor Relations Board, dated December 9, 1937.

4. Amended notice of hearing, dated December 15, 1937.

5. Respondent's request for extension of time to file answer, dated December 15, 1937.

6. Order granting extension, dated December 15, 1937.

7. Respondent's answer to the complaint, sworn to December 15, 1937.

8. Respondent's notice of special appearances and motion to dismiss the complaint.

9. Certified copy of the order designating Dwight Stephenson Trial Examiner for the National Labor Relations Board, dated December 16, 1937.

Documents listed hereinabove under items 1-9, inclusive, are contained in the exhibits and included under the following item:

10. Stenographic transcirpt of testimony before Dwight Stephenson, Trial Examiner for the National Labor Relations Board, on December 16, 17, 20, 21, 22, 30, 1937, and January 10, 1938, together with all exhibits introduced in evidence.

11. Copy of the Intermediate Report of Trial Examiner Stephenson dated April 30, 1938.

12. Copy of respondent's telegram, dated May 6, 1938, requesting extension of time to file exceptions to the Intermediate Report.

13. Copy of telegram, dated May 7, 1938, granting extension.

14. Copy of respondent's telegram, dated May 19, 1938, requesting an additional extension of time for filing exceptions.

15. Copy of telegram, dated May 20, 1938, granting additional extension.

16. Copy of the Union's exceptions to the Intermediate Report.

17. Copy of respondent's exceptions to Intermediate Report.

18. Copy of form letter, dated September 22, 1938, advising of the right to apply for oral argument or for permission to file briefs.

19. Copy of the decision, findings of fact, conclusions of law and order issued by National Labor Relations Board, February 27, 1939, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof the Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 20th day of June, 1939.

[Seal] NATHAN WITT

National Labor Relations Board

[Endorsed]: No. 9218. United States Circuit Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Los Angeles Brick & Clay Products Co., a corporation, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed, June 26, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY BOARD

I. The National Labor Relations Act is applicable to respondent and the employees here involved.

II. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8, subdivisions (1), (3) and (5) of the Act.

III. The Board's order is wholly valid and proper under the Act.

Docketed.

[Endorsed]: Filed Jun. 26, 1939, Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE PORTION OF THE RECORD TO BE PRINTED

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, and prays that in accordance with paragraph 6 of rule 19 of this Court, the following portion of the record shall be printed:

1. Documents enumerated under items 1, 2, 3, 7, 8, 9, 11, 18, 19 in the certificate of the National

Labor Relations Board dated June 20, 1939, filed herewith in this Court.

2. The following exhibits received in evidence by the Board and filed herewith in this Court: Board Exhibits 2, 3, 4, 8, 9, 11, 12, 13, 14, 17; Respondent Exhibits 1, 2, 5, 6, 7, 9.

3. The following portion of the stenographic transcript of the testimony filed herewith in this Court:

Beginning on		And Ending with	
Page	Line	Page	Line
2	22	4	19
5	8	5	9
5	17	9	1
9	16	13	25
15	6	19	15
20	21	20	25
21	21	24	6
24	17	31	25
33	8	34	2
34	9	34	9
36	6	37	8
38	24	44	1
44	15	45	5
49	2	49	18
50	12	51	10
55	7	59	22
60	1	60	13
60	20	65	9
68	12	68	22

Beginning on		And Ending with	
Page	Line	Page	Line
69	9	71	13
73	10	73	15
75	16	75	22
77	2	80	4
81	14	81	19
82	12	84	5
88	14	92	17
92	24	92	25
97	10	99	19
100	21	100	23
101	5	101	9
102	8	105	12
107	19	107	19
111	3	111	3
111	23	112	4
113	5	113	5
114	6	120	15
122	14	122	24
123	16	131	22
133	6	133	17
134	6	137	22
138	5	139	20
142	9	142	9
143	2	143	2
144	9	145	3
145	6	149	13
149	18	149	18
149	24	152	14

Beginning on		And Ending with	
Page	Line	Page	Line
154	4	159	6
163	24	168	14
169	10	170	2
171	1	173	5
174	3	175	14
177	23	178	4
180	8	183	25
193	1	199	2
199	14	204	3
204	21	206	2
209	21	211	18
212	1	212	4
234	17	234	25
236	5	236	12
242	25	247	4
248	2	249	22
261	5	261	8
262	19	263	10
264	4	264	11
270	13	270	16
274	14	278	22
279	16	281	25
282	5	282	17
283	7	285	4
286	14	303	24
305	7	306	16
307	19	312	15
313	8	313	19

Beginning on		And Ending with	
Page	Line	Page	Line
314	12	318	14
320	20	323	8
329	22	331	6
332	11	336	2
336	16	337	17
340	11	341	6
344	13	345	4
347	10	347	23
348	2	348	5
348	11	351	25
352	22	353	25
354	1	354	2
354	16	357	10
357	16	358	10
360	11	360	15
361	17	364	3
365	1	365	21
368	4	373	1
375	1	380	20
382	4	382	21
383	7	383	17
384	1	391	13
393	24	394	12
397	5	398	24
400	8	406	8
406	16	407	17
410	1	410	4
416	9	416	13

Beginning on		And Ending with	
Page	Line	Page	Line
418	4	418	24
420	8	420	13
424	10	431	6
438	23	441	3
445	1	449	21
459	11	459	11
459	15	459	17
461	14	462	7
466	19	469	2
470	2	473	7
475	3	478	23
484	20	485	9
486	8	487	9
488	16	493	14
493	24	495	23
496	9	497	15
498	9	498	17
505	4	506	2
517	18	519	2
520	1	520	21
521	9	521	19
527	1	528	4
529	16	530	20
533	9	533	9
533	16	533	22
535	17	535	21
539	5	539	11
539	22	540	16

Beginning on		And Ending with	
Page	Line	Page	Line
545	20	548	25
549	22	549	25
551	19	552	24
553	4	553	12
554	23	555	8
562	1	562	10
572	1	574	21
576	7	582	11
583	2	583	18
584	10	599	12
601	6	602	25
604	11	605	16
608	17	609	6
616	20	617	13
620	4	620	12
624	2	624	6
636	16	641	7
650	21	651	2
669	18	669	22
684	12	684	16
688	11	690	10
696	23	700	5
701	17	705	24
706	5	707	20
708	2	708	17
712	13	712	20
730	19	735	6
741	22	748	6

Beginning on		And Ending with	
Page	Line	Page	Line
759	4	762	13
767	11	769	5
788	19	789	4
795	14	801	18
802	23	804	7
804	13	811	22
814	5	814	15
828	15	828	24

Dated: Washington, D. C., July 20, 1939.

[Endorsed]: Filed Jul. 24, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

RESPONDENT'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Los Angeles Brick & Clay Products Company, respondent herein, and prays that in accordance with Paragraph 6 of Rule 19 of this Court the following additional portions of the record be printed:

1. The following exhibits received in evidence by the Board and filed herewith in this Court: Respondent's exhibits 8, 10 and 11.

2. The following portions of the stenographic transcript of the testimony filed herewith in this Court:

Beginning on		And Ending with	
Page	Line	Page	Line
48	11	49	1
52	1	53	5
53	25	54	15
92	25	94	4
97	1	97	5
110	18	110	24
159	7	159	18
162	20	163	4
211	19	211	25
212	5	213	17
235	1	236	4
352	1	352	21
358	11	359	22
360	5	360	10
360	20	361	11
451	12	452	4
453	9	454	11
456	20	457	7
459	18	460	8
464	13	464	25
465	4	465	14
465	16	466	8
483	20	483	22
484	6	484	9

Beginning on		And Ending with	
Page	Line	Page	Line
498	19	499	1
499	7	502	3
512	15	512	15
514	12	514	18
514	24	515	10
531	5	532	6
532	9	532	15
535	22	538	1
539	18	539	21
541	5	541	17
555	11	555	11
555	24	556	24
557	7	557	18
558	2	560	9
610	2	610	13
610	24	612	11
613	1	615	7
620	13	620	25
621	10	621	10
621	25	622	20
622	22	623	6
624	7	626	22
627	22	629	5
629	11	629	15
630	24	632	3
678	10	679	2
687	4	687	8
687	16	688	10

Beginning on		And Ending with	
Page	Line	Page	Line
693	14	693	24
700	6	701	14
713	5	714	13
718	13	718	17
721	6	724	5
764	13	766	12
774	7	775	24
794	3	795	5
811	23	813	2
815	2	815	2
815	15	815	18
816	1	818	18
820	3	821	13
823	22	823	25

Dated at Los Angeles, California, this 31 day of July, 1939.

HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent.

[Endorsed]: Filed Aug. 13, 1939. Paul P. O'Brien, Clerk.

No. 9218

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Supplemental Transcript of Record

On Petition for Enforcement of an Order of the National Labor Relations Board.

FILED
OCT 2 1 1939
PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY. 545 SANSOME STREET. SAN FRANCISCO 85-10-20-39

No. 9218

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Supplemental Transcript of Record

On Petition for Enforcement of an Order of the National Labor Relations Board.

PARKER PRINTING COMPANY. 545 SANSOME STREET. SAN FRANCISCO 85-10-20-39

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Amended designation of additional portions of the record to be printed 575

Application for an order permitting Respondent to file amendment to designation of additional portions of the record to be printed 573

Order granting 576

Designation, Amended, of additional portions of the record to be printed 575

Exceptions to the Intermediate Report 577

Order granting motion to file additional designation of record to be printed 576

Statement of Exceptions to the record and to the Intermediate Report 577

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9218

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS COMPANY,
Respondent.

On Petition for Enforcement of an Order
of the National Labor Relations Board

APPLICATION FOR AN ORDER PERMITTING RESPONDENT TO FILE AMENDMENT TO DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the respondent, Los Angeles Brick & Clay Products Company, and prays that an order be made permitting respondent to file Amended Designation of Additional Portion of the Record to be Printed, copy of which proposed Amended Designation is attached hereto and made a part hereof, and to permit the inclusion in the printed

record, as a supplement thereto, of respondent's Exceptions to the Intermediate Report, copy of which is included as Document #17 in the Certificate of the National Labor Relations Board dated June 20, 1939 on file herein.

This application is made for the reason that the undersigned counsel for respondent inadvertently failed to include said document in respondent's Designation of Additional Portions of the Record to be Printed, and for the further reason that respondent's said counsel erroneously assumed that all of the documents included in the Certificate of the National Labor Relations Board on file herein would be included in the printed record without special designation.

In the opinion of respondent's said counsel, said respondent's Exceptions to the Intermediate Report are material upon this appeal.

Respondent files herewith in further support of this application the consent of the National Labor Relations Board to the inclusion of said respondent's Exceptions to the Intermediate Report in the printed record as in this application prayed for.

Wherefore, respondent prays this Honorable Court to make an order permitting respondent to file Amended Designation of Additional Portions of the Record to be Printed, and permitting the inclusion in the printed record, as a supplement thereto, of respondent's Exceptions to the Inter-

mediate Report, and granting such other and further relief as may be proper.

HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent

[Endorsed]: Filed Sept. 26, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

RESPONDENT'S AMENDED DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the respondent, Los Angeles Brick & Clay Products Company, and prays that the following additional portions of the record be printed:

1) Respondent's Exceptions to the Intermediate Report, being Document #17 in the Certificate of the National Labor Relations Board dated June 20, 1939 and heretofore filed in this Court.

Dated at Los Angeles, California, this 21 day of September, 1939.

HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent

[Endorsed]: Filed Sept. 26, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from proceedings of Monday, October 2, 1939.

Before: Garrecht and Denman, CJJ.

[Title of Cause.]

ORDER GRANTING MOTION TO FILE ADDITIONAL DESIGNATION OF RECORD TO BE PRINTED, ETC.

Upon consideration of the application of respondent for an order permitting respondents to file amended designation of additional portion of the record to be printed, and to permit the inclusion in the printed record, as a supplement thereto, of respondent's Exceptions to the Intermediate Report, and stipulation of counsel for petitioner thereto, and by direction of the Court, It Is Ordered that said application be, and hereby is granted.

United States of America

Before the National Labor Relations Board
Twenty-first Region

Case No. C-584

In The Matter of

LOS ANGELES BRICK & CLAY PRODUCTS COMPANY, a corporation,

and

ALBERHILL CLAY PRODUCTS WORKERS UNION, No. 373.

STATEMENT OF EXCEPTIONS TO THE RECORD AND TO THE INTERMEDIATE REPORT.

Los Angeles Brick & Clay Products Company, a corporation, respondent herein, presents herewith its statement of exceptions to the record and to the intermediate report filed herein.

I.

Exception to ruling on motion to dismiss proceedings for lack of jurisdiction and to jurisdictional findings.

Respondent prior to filing its answer herein filed its Notice of Special Appearance and Motion to Dismiss the complaint and all proceedings thereon, upon the grounds that said respondent had not during any time mentioned in said complaint or within two years prior thereto, and that it was not then, engaged in any operations, the interruption of which would have the effect of burdening or obstructing the free flow of commerce among the several states, territories of the United States, or with foreign countries, and upon the ground that the alleged activities of respondent as set forth in the complaint herein had not a close, intimate or substantial relation to or effect upon trade, traffic or commerce among the several states, territories of the United States, or with foreign countries, or had led or tended to lead to labor disputes, burdening or obstructing commerce, or the free flow of commerce within the meaning of the National Labor

Relations Act, and within the meaning of Article I, Section 8, and the 10th Amendment to, the Constitution of the United States.

In addition to said Motion to Dismiss for lack of jurisdiction the jurisdictional question was also put in issue by the complaint and the answer thereto filed herein by respondent.

At the commencement of the hearing before the Trial Examiner it was stipulated by and between the attorney on behalf of the National Labor Relations Board and the attorneys on behalf of respondent that the evidence concerning the question of jurisdiction would be taken last in order and the Trial Examiner reserved his ruling on the said Motion to Dismiss for want of jurisdiction until after all the jurisdictional facts had been heard. (Tr. 4)

Thereafter and prior to the introduction of evidence on the question of jurisdiction the following stipulation was offered by respondent and accepted by the Board. (Tr. 794-795)

> "Be it stipulated that all testimony and evidence introduced on behalf of Respondent upon the issue of jurisdiction as joined in the complaint and answer filed herein marked respectively Board's Exhibit 1c and 1m, be deemed and considered for all purposes as having been introduced by Respondent in support of its special Appearance and Motion to Dismiss for lack of jurisdiction heretofore filed

herein, marked Board's Exhibit 1 (1), to the same extent and with the same force and effect as if such evidence and testimony had been separately and regularly offered and introduced on behalf of respondent company in support of such Motion to Dismiss; and that all testimony and evidence introduced on behalf of the Board upon the issue of jurisdiction as joined in said complaint and answer be deemed and considered for all purpose as having been introduced in contravention of said Special Appearance and Motion to Dismiss for lack of jurisdiction, to the same extent and with the same force and effect as if such testimony and evidence had been separately and regularly offered and introduced on behalf of the Board in contravention of said Motion to Dismiss, and

Be it further stipulated that said Motion to Dismiss for lack of jurisdiction may be submitted for decision upon the proofs so adduced as hereinbefore in this stipulation referred to."

Thereafter upon the conclusion of said hearing the Trial Examiner under and in pursuance of the stipulation hereinabove referred to made his ruling upon respondent's Motion to Dismiss the complaint for lack of jurisdiction and said motion was by said Examiner denied. (Tr. 828)

Respondent excepts to the said ruling of the Trial Examiner denying respondent's Motion to Dismiss for lack of jurisdiction, and excepts to the Trial

Examiner's intermediate report, and particularly to that portion thereof wherein the Trial Examiner found:

> "The total volume of its respondent's sales for the year 1936, and from January to November, 1937, both inclusive, amounts to approximately $970,000.00. Of said sales approximately $131,000.00 in value were either by respondent or its purchasers shipped outside the State of California. For either or both intrastate and interstate shipments, respondent used thirteen (13) different truck carriers, and five (5) different railroad carriers",

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner further found as follows:

"Effect of Unfair Labor Practices Upon Commerce

> Upon the whole record the undersigned finds that the activities of respondent set forth in Section III above occurring in connection with operation of respondent set forth in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and have led and tended to lead to labor disputes burdening commerce and the free flow of commerce."

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner concludes in paragraph 1 of his conclusions that by the acts therein set forth, and as set forth in the Findings of Fact, respondent

> "has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8, Subdivision (1), and Section 2, Subdivisions (6 & 7) of the National Labor Relations Act."

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner concludes in paragraph 2 of his conclusions that by the acts therein set forth and as set forth in the Findings of Fact, respondent

> "has engaged in and is engaging in unfair labor practices affecting Commerce within the meaning of Section 8, Subdivision (3) and Section 2, Subdivisions (6 & 7) of the National Labor Relations Act."

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner concludes in paragraph 3 of his conclusions that

> "respondent by its refusal to bargain collectively with Alberhill Clay Products Workers Union No. 373 as set forth in the above findings of fact, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8, Subdivision (5) of the National Labor Relations Act."

Said exceptions and each of them are taken and made upon the grounds and for the reasons that there is not sufficient or substantial, or any evidence

to support the said findings and conclusions, or any of them, and that the Trial Examiner in denying respondent's Motion to Dismiss for lack of jurisdiction erred to the prejudice and substantial injury of the rights of respondent.

Jurisdictional Findings Not Supported By Evidence

The findings that of the total volume of respondent's sales for the year 1936 and from January to November, 1937, both inclusive, approximately $131,000.00 in value were either by respondent or its purchasers shipped outside the State of California, is not supported by the evidence.

The evidence shows without conflict that respondent's total sales for the year 1936 were $501,-379.62, and that respondent's total sales for the year 1937 from January to November, inclusive, were $468,857.64, the aggregate total for the year 1936 and the year 1937 from January to November inclusive, being $970,237.26. (Respondent's Exhibit #5)

However, with reference to sales made outside the State of California, the evidence shows conclusively that the value of sales of all products DELIVERED BY RESPONDENT TO DESTINATIONS OUTSIDE THE STATE OF CALIFORNIA in the year 1936 aggregated only $26,927.16. (Respondent's Exhibit #6). In other words in the year 1936 of the total sales by respondent of its products of $501,379.62 only $26,927.16 or

5.37% represented sales of products of respondent delivered by respondent to destinations outside the State of California.

The evidence further conclusively shows that in the year 1937 from January to November, inclusive, the value of sales of all products of respondent delivered by respondent to destinations outside the State of California aggregated only $32,149.96. (Respondent's Exhibit #7). In other words in the year 1937 from January to November, inclusive, of the total sales by respondent of its products of $468,857.64 only $32,149.96 or 6.85% represented sales of products of respondent delivered by respondent to destinations outside the State of California.

The evidence therefore further shows conclusively that of the total value of all sales of respondent in both 1936, and 1937 from January to November, inclusive, of $970,237.26 ONLY $59,077.12 OR 6.08% REPRESENTED SALES OF RESPONDENT'S PRODUCTS DELIVERED BY RESPONDENT TO DESTINATIONS OUTSIDE THE STATE OF CALIFORNIA.

The uncontradicted evidence further shows THAT ALL OF THE SALES OF RESPONDENT'S PRODUCTS FOR THE YEAR 1936, AND YEAR 1937 FROM JANUARY TO NOVEMBER INCLUSIVE, (respondent's Exhibit #5), except the sales shown in respondent's exhibits 6 and 7 admittedly made and delivered to purchasers outside the State of California, WERE SALES OF

PRODUCTS MADE AND DELIVERED BY RESPONDENT TO DESTINATIONS WITHIN THE STATE OF CALIFORNIA. (Tr. 807-808)

In other words, of respondent's total sales for the year 1936, and the year 1937 from January to November, inclusive, 93.92% were sales of products made and delivered by respondent to destinations within the State of California, and there is no evidence whatsoever of any character in the record showing that any of said products ever left the confines of the State of California, or in any manner moved in, burdened, or in anywise affected to the slightest degree interstate commerce.

The finding of the Trial Examiner that of the total sales for the year 1936, and the year 1937 from January to November inclusive, "approximately $131,000.00 in value, were either by the respondent or its purchasers shipped outside the State of California" is wholly unsupported by the uncontradicted evidence in the record. The only explanation for the use by the Examiner of the figure of $131,000.00 in his findings is that he has erroneously added to the sales admitted by respondent to have been made and delivered by it to destinations outside the State of California, the sales shown in Board's Exhibits 11 and 12, totaling $72,258.27. However, as said Board's Exhibits 11 and 12 expressly state the figures therein set forth only purport to represent the value of products SOLD AND DELIVERED BY RESPONDENT IN THE STATE OF CALIFORNIA, THE INTENTION

OF THE PURCHASER TO SHIP OUT OF THE STATE BEING INDICATED BUT THE ACTUAL DESTINATION OF THE PRODUCTS BEING UNKNOWN.

As will be hereinafter pointed out, in determining whether or to what extent a person is engaging in interstate commerce as distinguished from engaging in purely intrastate commerce, it must be shown that the products in question actually moved in interstate commerce; in other words that the products actually cross the territorial boundary and move out of the state.

The products referred to in Board's Exhibits 11 and 12 are products which were both SOLD and DELIVERED by respondent within THE STATE OF CALIFORNIA. Further they are products, THE ACTUAL DESTINATION OF WHICH, if not at the point to which delivered, IS UNKNOWN, AND NOT SHOWN TO BE OTHERWISE THAN THE SAID POINT AT WHICH THE PRODUCTS WERE DELIVERED. However, for the sole reason that at the time of the purchase of the products referred to in Board's Exhibits 11 and 12 AN INTENTION OF THE PURCHASER TO SHIP THE PRODUCTS OUT OF THE STATE OF CALIFORNIA WAS MERELY INDICATED, the Trial Examiner by his said finding has given such products the status of goods moving in interstate commerce, by adding the total of such sales to the sales admitted by respondent (respondent's Exhibits 6 and 7), to have been

actually sold and delivered by it outside the State of California.

Since the actual destination of these products is unknown it cannot be presumed that they left the State of California, and especially can this presumption not be indulged in where the uncontradicted evidence shows that the products were both sold and delivered within the State of California. To indulge in such a presumption is merely to speculate, and the question as to whether or not respondent is subject or amenable to the provisions of the National Labor Relations Act cannot be determined through conjecture or speculation, and the finding in question is erroneous.

The law is clear that in measuring the extent to which respondent is engaged in interstate commerce, the sales of its products covered by Board's Exhibits 11 and 12 must be excluded. Such sales must be so excluded for the reason that the actual movement of the products referred to was not established to be interstate nor in fact was the actual movement thereof, beyond or from the point of delivery within the State, shown at all. That the actual movement of the products in question MUST BE SHOWN to be interstate has been established by the United States Supreme Court in the case of Santa Cruz Fruit Packing Company vs. National Labor Relations Board, (U. S.) decided March 28, 1938. The Court said:

"First.—There is no question that petitioner was directly and largely engaged in interstate

and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. See Savage v. Jones, 225 U. S. 501, 520; Texas & N. OR. R. Co. v. Sabine Tram Co., 227 U. S. 111, 114, 122; Pennsylvania R. R. Co. v. Clark Coal Mining Co., 238 U. S. 456, 465-468. A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, *where the actual movement is interstate,* does not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. Pennsylvania R. R. Co. v. Clark Coal Mining Co., supra." (Italics ours.)

The Court in said case further states: "and the place where the manufacturer makes his sales is not controlling *if the sales in fact are in interstate commerce.*" (Italics ours.)

Having therefore shown the measure of participation of respondent in interstate commerce to be an amount not to exceed 6.08% of its total sales of products for the two-year period covered, the question then presents itself as to what bearing this fact in and of itself has in determining whether the re-

spondent is engaging in interstate commerce within the meaning of the National Labor Relations Act and the applicable provisions of the Constitution of the United States.

At the outset we submit to the most recent decision of the United States Supreme Court on that subject (Santa Cruz Fruit Packing Co. vs. National Labor Relations Board, supra), and for the purpose of argument concede that this question cannot be answered by a mere reference to percentages.

It is fully to be realized that the test is one entirely of degree, that is, the determination of the extent to which, in light of a composite picture of the respondent's operations, including the acquisition of raw materials and the manufacture and sale thereof, the alleged unfair labor practices herein involved had "such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes" (Santa Cruz etc. vs. N. L. R. B., supra), or the extent to which said unfair labor practices burdened or obstructed interstate commerce or the free flow of interstate commerce, or led or tended to lead to a labor dispute burdening or obstructing interstate commerce or the free flow of interstate commerce.

In the light of the foregoing rules, we respectfully submit that the jurisdictional findings hereinbefore specially excepted to are and each of them is

wholly unsupported by the evidence which further shows as follows:

(1) That the principal raw material used by respondent in the manufacture of its products is clay, produced by it at its Alberhill, California, plant. Also used in said manufacture are certain chemicals purchased by respondent from local concerns in the State of California. (Tr. 806-807)

(2) That none of the raw materials used by respondent in the manufacture of its products come from without the State of California. (Tr. 805, 807)

(3) That respondent did not ship any raw materials from California to points outside the State of California during the years 1936-1937. (Tr. 805)

(4) That respondent has never registered a trade-mark with the United States Patent Office. (Tr. 805)

(5) That respondent has never registered with the Federal Securities and Exchange Commission. (Tr. 805)

(6) That respondent has never registered under the Federal Motor Carriers Act of 1935. (Tr. 805)

(7) That as to all sales made by respondent in which delivery is made within the State of California, the company thereafter has no control over the destination of the goods or any responsibility for loss or damage thereof. (Tr. 808)

(8) That respondent is not required by the Board of Equalization of the State of California to pay a sales tax on sales listed in Respondent's Exhibits 6 and 7. (Tr. 808)

(9) That respondent is required by the State Board of Equalization of California to pay sales taxes upon the products sold and delivered in the State of California, as set forth in Board's Exhibits 11 and 12. (Tr. 808)

(10) That respondent has no regularly appointed sales agency outside the State of California. (Tr. 820)

(11) That respondent has no regularly appointed dealers outside the State of California. (Tr. 820)

(12) That respondent has no established distribution points outside the State of California. (Tr. 820)

(13) That respondent does not do any national advertising. (Tr. 820)

(14) That respondent does not have any traveling salesmen who cover territories outside the State of California. (Tr. 820)

(15) That respondent neither owns nor operates trucks that deliver products outside the State of California. (Tr. 820)

(16) That respondent's production of clay products of all kinds, in relation to or compared with the total production of clay products manufactured by the various clay products manufacturers in the United States, including

those within the State of California, is INFINITESIMAL. (Tr. 809, Respondent's Exhibit 8; Tr. 812, Respondent's Exhibit 10.)

(17) THAT AT NO TIME PRIOR TO, DURING OR AFTER THE STRIKE AT RESPONDENT'S PLANT WAS RESPONDENT PREVENTED FROM MAKING ANY SHIPMENTS, EITHER INTRA OR INTERSTATE, BY REASON OF THE LABOR DIFFICULTIES OR THE STRIKE. (Tr. 820)

The evidence further shows without conflict that respondent's business does not consist of a continuous flow of raw materials coming into the State from without, its manufacture by respondent and the resumption of the flow of manufactured products from respondent's plant to points without the State. The familiar test, therefore, referred to by the metaphor "stream of commerce", has no application here.

The record further shows respondent to be a small clay products manufacturer, employing at the most only 166 men at its plant and only five (Tr. 825) salesmen operating entirely within the State of California, and in fact within a radius of not to exceed 125 miles from its plant at Alberhill, (Tr. 823), and doing a total sales business for the years 1936 and 1937 of an average of approximately $485,000.00 per year; and economically prevented because of the relatively heavy weight of its prod-

ucts, because of freight rates, and because of the location of competitive companies, from shipping its products for any great distance from the place of manufacture at Alberhill, California. (Tr. 819, 824-825)

In relation to the picture thus presented by the evidence of respondent's business and operations, the actual participation of respondent in interstate commerce shown by the percentage (6.08%) of its products sold and delivered out of the state, is reduced to a degree of participation which is obviously inconsequential, whether contrasted with or compared to the total of all interstate commerce carried on by all persons between all the United States and foreign countries, or whether contrasted or compared with the total only of interstate commerce carried on by all clay products manufacturers in the United States, or by any other standard.

We submit therefore that it cannot be said that the alleged unfair labor practices or the labor dispute occurring at respondent's plant had either a close or a substantial relation to the freedom of interstate commerce from injurious restraint nor that said alleged practices in any manner, substantial or otherwise, burdened or obstructed interstate commerce or the free flow of interstate commerce, or that said alleged practices led or tended to lead to a labor dispute either burdening or obstructing interstate commerce or the free flow of interstate commerce. Especially must this be the conclusion drawn in the light of the undisputed evidence that,

as heretofore pointed out, at no time prior to, during or after the strike at respondent's plant was respondent prevented from making any shipments, either intra or interstate, by reason of the labor difficulties or the said strike, and further inquiry into the purely speculative realm of whether said practices or said strike might as a matter of law HAVE TENDED so to obstruct or interfere with interstate commerce is therefore foreclosed.

As further said in the Santa Cruz case, Supra:

> "Third.—It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. Schechter Corporation v. United States, 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions'." (Italics ours.)

In all deference to the Court's admonition in the Santa Cruz case not to attempt to overcome what is

reasonably clear in a particular application by the simple and familiar dialectic of suggesting doubtful and extreme cases, we earnestly submit, in conclusion, that in the event this Board determines that it is entitled to assert jurisdiction over respondent in the enforcement of the National Labor Relations Act, it will be asserting a principle that federal jurisdiction within the meaning of the United States Constitution attaches to each and every person engaged in business within a State and whose participation in the sum total of interstate commerce within the United States or with foreign countries is but minute, petty and trifling; and adopting the converse of the language used by the Court in the Santa Cruz case, we submit that it would be difficult to find a case in which unfair labor practices, assuming they were committed, had a MORE INDIRECT or LESS EFFECT upon interstate and foreign commerce, than the case at bar.

II.

EXCEPTIONS TO PARAGRAPH 3 OF INTERMEDIATE REPORT RE UNFAIR LABOR PRACTICES.

A. Organizational Efforts of the Union.

Respondent concedes that the findings herein made are substantially in accord with the evidence with the following exceptions hereinafter noted:

(1) The evidence shows that the handbill advance notices of the June 1 meeting of the union were not only freely distributed among

respondent's EMPLOYEES as found by the Examiner, but were also freely distributed in and about the offices of respondent, both at the Alberhill plant and at the office of respondent in Los Angeles, where not only the employees of respondent were employed, but where also the various foremen and other supervisory employees might and did in fact see them. (Tr. 349 & 689)

(2) The evidence shows that four of respondent's foremen attended the said June 1 meeting as found by the Trial Examiner, but the additional finding that they or any of them "observed" is ambiguous, and in that state the finding is, to say the least, incomplete. If the finding that they "observed" is intended to convey merely the idea that while at the meeting they were in possession of their visual faculties only, the finding of course is harmless, but if by the finding it is intended to convey the thought that the foremen attended the meeting as part of a plan to spy upon or to make mental or actual notes of the union activities of the men, the finding then becomes important, and in that sense is excepted to by respondent.

The evidence does not show that they attended the meeting with any such ulterior motive, but as the evidence does show, and as the foremen all testified, they attended the meeting entirely from motives of curiosity. (Tr. 710). The notices of the

meeting themselves did not restrict the attendance to any particular class of respondent's employees, nor did the notice exclude from the open meeting the foremen or other supervisory employees of respondent. (Tr. 472). Furthermore, the evidence shows that the meeting was noticed to be held at the local American Legion Hall in the small town of Elsinore, of which organization some of the foremen who attended, were members. Furthermore, the evidence affirmatively shows that none of the attending foremen had been instructed to, nor had it been suggested to them that they, attend the meeting, either by Mr. Larson, the general superintendent of respondent, or by Mr. Bodine, the plant superintendent. (Tr. 499). The evidence also shows affirmatively that none of the foremen were asked to leave the meeting, nor was any objection voiced to their attending and remaining. Also strongly indicative of the intention of the foremen in attending is the fact that when the speaker of the evening finished his introductory remarks and requested prospective members to come forward and make application for membership in the union, the foremen voluntarily began to leave, three almost immediately, and the fourth very shortly thereafter. (Tr. 551) Had they attended the meeting for the purpose of spying upon the men, in the normal pursuit of such a plan, they would have most certainly remained in order to make mental or actual note of the particular employees who might make application to join the union. The evidence shows

conclusively that they obviously were not interested in making such observations, but on the contrary left the men free to join the union if they wished, and in such numbers as they wished, in complete privacy. (Tr. 473, 500)

We therefore submit that if the finding hereinabove noted that the foremen "observed" while at the meeting is intended to convey the meaning hereinabove suggested, the finding constitutes a gross distortion of the evidence, and is totally unsupported thereby.

B. The Refusal to Bargain Collectively.

(1) Respondent excepts particularly to the finding appearing under the foregoing heading at page 5 of the intermediate report that

> "The above-mentioned requests and notice of intention to strike should respondent fail to comply therewith, were incorporated in a written document, which documnet was delivered to respondent on the morning of June 10, 1937."

for the reason that the evidence fails to show that any notice of intention to strike was ever given by the union or any of its representatives to respondent either orally or in writing. The only document delivered to respondent on the morning of June 10th of which there is any record in the evidence is Board's Exhibit No. 2 which reads as follows:

> "1. The Los Angeles Brick and Clay Products Company recognize and accept as the collective bargaining agent of its employees the

recently formed Union known as the Alberhill Clay Workers Union, affiliated with the International Mine, Mill and Smelter workers.

2. That all employees whose services were terminated since the first day of June? Nineteen hundred, Thirty-seven reasons of the reported depression in business and shortage of orders on hand to be filled, be reemployed and put to work at the Alberhill plant of the Los Angeles Brick and Clay Products Company before seventy thirty A. M. Friday, the eleventh day of June *nineteen and* thirty seven, and in the existence of said depression of business and lack of orders on hand that the men shall be given equal number of hours of work each month until said depression is over; thus relieving any man or group of men from standing *from standing* the full brunt of said depression and that all overtime consisting of time over 8 hours in any one day and 40 hours in any week be paid at the rate of one and one-half time. This article to be in effect until July 15, 1937.

The representatives and (or) the president of the Alberhill Clay Workers Union be notified of the decision of acceptance or refusal reached by the Los Angeles Brick and Clay Products Company by twelve o'clock midnight of Thursday the tenth day of June Nineteen Hundred and Thirty-seven and in the existence of no notification by the specified hour the Union shall act upon the supposition that their

requests have been denied and will not be complied with.

EDWARD E. HANNUM
President
LAURENCE C. McNUTT
Sec. & Treas."

There is no reference in said document to any intention on the part of the union or its members to strike, and it is submitted that by no rules or interpretation or construction could such a meaning be ascribed to its contents. Furthermore, there is no evidence in the record that any oral notice of intention to strike was given to respondent either at the time of the presentation of said Exhibit No. 2 to respondent on the morning of June 10th, or at any time theretofore or thereafter. The evidence further shows that Mr. Bodine, to whom Exhibit No. 2 was originally presented, did not consider said Exhibit No. 2 as containing any notice of intention to strike, should the dead line therein referred to pass without compliance by respondent with the demands therein contained. (Tr. 498) Furthermore, there is no evidence whatsoever in the record that respondent, its foremen, or other supervisory employees had any knowledge of any character whatsoever that a strike would be called, until the picket line was formed about respondent's plant at or about 7:30 A. M. June 11th, exactly twenty-four hours after the receipt by respondent of said Board's exhibit No. 2.

(2) Respondent further particularly excepts to the finding contained on pages 5 and 6 of said intermediate report, wherein it is found that:

> "the respondent failed to reply to the said requests of the union, and the members thereof went out on strike and established a picket line at the respondent's said plant."

for the reason that said finding is unsupported by the evidence, the uncontradicted evidence in the record being that the respondent did reply to said requests of the union.

Mr. Bodin, plant superintendent of respondent, testified concerning his conversation on the afternoon of June 10th with Mr. Lucas, the representative of the union who presented Exhibit No. 2 to Mr. Bodine earlier that day, as follows:

> Q. Now, Mr. Lucas testified that late in the day of June 10 that he had a conversation with you respecting the presentation of this petition, and concerning unions. Do you recall such a conversation? A. I do.
>
> Q. And what did you say to Mr. Lucas at that time?
>
> A. I went out to the machine shop where Mr. Lucas was working, and told him that I had taken this matter up with Mr. Larson; that Mr. Larson stated that he couldn't do anything until he had either consulted with the board of directors or called a directors' meeting, one of the two. I don't recall just how he stated it,

but it was in reference to taking this matter up with the board of directors. (Tr. 490-491)

(3) Respondent further particularly excepts to the finding appearing on pages 6 and 7 of said intermediate report, wherein it is found that

> "The respondent has at all times since June 10, 1937 refused to bargain collectively with Alberhill Clay Products Workers Union No. 373 as exclusive representative of respondent's said pit and production employees in respect to rates of pay, wages, hours of employment, and other conditions of employment."

for the reason that said finding is unsupported by the evidence.

The evidence shows without conflict that at no time from the date of formation of the union until the evidence in the form of Board's Exhibit No. 5 was introduced at the hearing in this matter on December 16, 1937, did respondent have any information, assurance or evidence from any source that a majority of respondent's employees either on June 9 or 10, or at any time thereafter, had designated the union as their representative for the purpose of collective bargaining with respondent, nor with the possible exception of the information afforded by Board's Exhibit No. 4, did respondent have any information as to which of its employees belonged to the union. (Tr. 501)

Reference to Board's Exhibit No. 2 shows that it does not even purport to state that the union repre-

sented a majority of respondent's employees, nor did it purport to state that the union represented or was composed of any of the employees of respondent other than possibly the men who signed the notice, to-wit, Edward E. Hannum and Laurence C. McNutt. Furthermore, there is no evidence that at the time of the presentation of Board's Exhibit No. 2 to respondent, or thereafter, any oral representation, statements or assurances of any character were made by the union or its representatives to respondent that the union represented a majority of respondent's employees.

The only other attempt by the union to collectively bargain with respondent, if it may be called such, was by letter from the union to respondent dated June 15, 1937 and received by respondent June 16, 1937 (Board's Exhibit No. 3). Reference to this exhibit likewise shows that it did not purport to state that the union represented a majority of respondent's employees. Subsequent to sending the Board's Exhibit No. 3 the evidence shows that no further attempts were made by the union to bargain collectively or otherwise with respondent.

With respect to the alleged failure of respondent to reply further to the unreasonable demands contained in Board's Exhibit No. 2, other than the reply hereinabove noted to have been given by Mr. Bodine to Mr. Lucas who presented it, and with respect to the alleged failure of respondent to reply to Board's Exhibit No. 3, attention must be called to the Trial Examiner's finding appearing on

page 6 of said intermediate report, wherein it is found that subsequently to June 14, 1937

> "and while the strike was still on representatives of the respondent met in the office of the Regional Director of the Board at Los Angeles, California, in an attempt to settle their differences, but they were unable to do so."

Although the record contains conflicting and contradictory statements by some of the persons who attended that meeting the following testimony of Gustav Larson, general superintendent of respondent company, concerning that conference was not contradicted nor denied by any other person present at the meeting:

> Q. Did you attend a conference called by Dr. Nylander on June 15th?
>
> A. On June 15 I was down with Dr. Nylander myself. (Tr. 353)
>
> (By Mr. Howlett)
>
> Q. When you went in to see Dr. Nylander, who was present at the time?
>
> A. The first meeting, Dr. Nylander and myself and Mr. Howard; that is Dr. Nylander's assistant.
>
> Q. And when was that meeting held?
>
> A. On Tuesday the 15th.
>
> Q. And when you went in what did you say to Dr. Nylander?
>
> A. First we had two appointments. My office made the appointment for 9:00 o'clock in the

morning, and Dr. Nylander called in the morning and postponed it until 3:30 in the afternoon. And I went in and told him who I was and handed him that notice. He read it—can I change it a little bit?

Q. Surely.

A. When I got in Dr. Nylander wasn't in his office and the girl there took me into Mr. Howard and I said, "Dr. Nylander had an appointment with me," and we waited for a little while, then went out in the hall to look for Dr. Nylander, and he came, and Mr. Howard, myself and Dr. Nylander went into Dr. Nylander's office. That is how Mr. Howard was in with us. He read the letter over and threw it over across the table to Mr. Howard and he says, "That is illegal. They can't do it." And I said, "Well, they are doing it." And he was quite stirred up. He said, "I am going to San Diego during the week-end and I am going to make it a point to stop off at Alberhill and see if something can't be done and talk to the men." He said, "Any damage done?" And I said, "Certainly. They walked away from the kilns with fires burning and gave us no notice. We had to close down and there will be a big loss."

Then Dr. Nylander excused himself. He said, "I have a meeting. Will you go in and take this up with Mr. Howard?" Howard had left the office a few minutes before and I went into Mr. Howard's office and he said "I just called up

the headquarters for union. They said that the Alberhill had no authority to strike. It is illegal." He said, "The hotheads don't know what to do." (Tr. 361, 362, 363)

* * * * * * *

Q. Now, referring to this conference held in Dr. Nylander's office, at the time when the representatives of the union were present, just what took place at this conference, Mr. Larson? Can you tell the Examiner? A. I can.

Q. Did you arrive there before the employees? A. I did.

Q. Did you talk with Dr. Nylander?

A. I did.

Q. And what did you discuss with Dr. Nylander?

Trial Examiner Stephenson: Pardon me. Before you answer, was anyone else present besides you and Dr. Nylander?

The Witness: No.

Trial Examiner Stephenson: All right.

The Witness: Dr. Nylander said that the employees were in from Alberhill plant. That meeting was June 23. I believe it was the 23rd or 24th. Dr. Nylander said there was a committee here from Alberhill and they wanted to be—wanted all the men put back and rotate the work. I said that is not practical and can't be done. Furthermore, our business, we can't take all the men back because on account of lack of manufacturing orders.

I explained, I told him that we had no orders to make. We had material to send out, and right then the men came in.

Q. (By Mr. Mauritsen) Then what took place?

A. He said, "Boys, I can't do anything for you. You struck. You were the leaders. You told your men something that can't be lived up to. You got no right to run their business. Mr. Larson has told us his story and I believe it is true. If I didn't believe him, I got ample means to find out whether it is so or not."

Mr. McNutt spoke up and he said, "There wouldn't be any need of laying off men if the business was run right, if he put union labor, and all the material would sell itself."

Dr. Nylander said, "Well, boys, if you know so much about it, why don't you go out and sell the material? I am sure Mr. Larson would pay you a reasonable commission."

I said, "I am willing to sell it at the regular price."

One man spoke up and I think it was—I am not certain, but I think it was Mr. Hannum, and he said, "Bull. What do we know about the business?"

Q. (By Mr. Mauritsen) What happened?

A. So McNutt said—they wanted—we had then a lot of men back, workers hired on seniority, and I asked Mr. McNutt, "How long have you been working for the company?"

He said, "Five months."

I said, "What chance have you got to get back in seniority, *when only* need at most 150 men?"

Q. Then what?

A. And that ended the whole thing. He said, "Well, boys—" no, he didn't. Dr. Nylander said, "Boys, I can't do anything for you, but when they re-hire and start up the plant, I will see that seniority prevails", and that ended the meeting. (Tr. 438, 439, 440)

*   *   *   *   *   *   *

Q. (By Mr. Howlett) Did you have an occasion, or did you know the provisions of the Wagner Act at the time you went to see Dr. Nylander?

A. Didn't know anything about it.

Q. What did you go there for?

A. For advice, what to do.

Q. In regard to the difficulties that you were having at the Alberhill plant?

A. In regard to that demand, the difficulty.

Q. And did you get advice from him other than what you have stated?

A. No. (Tr. 447)

As pointed out above none of the foregoing testimony was denied or contradicted by any of the persons present at the conference, including Dr. Nylander who was not called as a witness and who did not testify.

Respondent submits that there was no **REFUSAL** on the part of respondent to bargain with the union, and the Nylander conference in and of itself, demonstrates that respondent did not refuse to bargain with the union. With respect to respondent's failure to bargain thereafter, we submit that Dr. Nylander's uncontradicted statements as testified to by Mr. Larson furnish sufficient excuse if any be required. Is respondent to be penalized for its failure in that regard after its general superintendent, Mr. Larson, had been told by the Regional Director of this Honorable Board that the strike was illegal and unauthorized, and can a finding that respondent refused to bargain collectively with the union in violation of the Act be supported in the face of such evidence?

C. The Lay-offs.

(1) Respondent further excepts to the finding appearing on page 7 of said intermediate report, wherein after finding that the strike terminated on June 25, 1937, it was found as follows:

> "and the evening before the union addressed a letter to the respondent requesting that certain employees including those hereinafter named be reemployed in order of their seniority"

for the reason that said finding is incomplete and misleading and not supported by the evidence. Board's Exhibit No. 4, which is the only letter sent by the union to the respondent at or about that date, and which we therefore must assume is the

letter to which the Trial Examiner refers in his findings, reads as follows:

"Alberhill Clay Workers' Union
Alberhill, California

June 24, 1937.

Los Angeles Brick Co.
Alberhill, Calif.

Gentlemen:

The accompanying list of men hereby place application for re-employment at such a time as you find business warrants re-opening the Alberhill Plant. Listed men to be taken back in order of seniority.

Yours truly,

....

Secretary & Treasurer."

The letter obviously shows that the union recognized that the same business depression which had caused the respondent to lay off forty-three (43) men between June 2nd and June 10th was still being felt, and that the extent to which respondent's plant would be reopened, if, as and when the respondent found that business conditions warranted reopening, would depend upon the same business conditions. This conclusion is inescapable in light of the request that the men listed be taken back on order of seniority.

In other words, the letter did not constitute an unqualified demand by the union for reinstatement

or reemployment of all of its members, but only that as business conditions warranted, the determination being left entirely to respondent, its members be rehired in order of seniority. The evidence shows that this is exactly what respondent did, and the mere fact that respondent, because of the continued business depression and lack of orders, was unable to reemploy all of the members of the union whose names appeared on Board's Exhibit No. 4 is no evidence of discrimination on the part of respondent as to the complainant members of the union.

(2) Respondent excepts to the finding appearing on page 7 of said intermediate report, wherein it is found that

> "all of the employees hereinafter named were either known to the respondent to be engaged in organizing the union or were observed in the picket line by the executive and supervisory employees of respondent"

for the reason that said finding is wholly unsupported by any substantial evidence, as hereinafter noted, and

(3) Respondent excepts to the findings commencing on page 7, to and including page 13, of said intermediate report, wherein it is found that Laurence McNutt, Edward Hannum, Lester Hazelton, Henry Boontjer, Thomas A. Roddy, William G. Ashworth, Lawrence H. German, Arnold Moss, James Grier, and Gerald Wenker were and each of

them was selected for layoff by respondent on the dates of their respective layoffs, as therein set forth, for the reason that said named persons joined and assisted a labor organization known as Alberhill Clay Products Workers Union No. 373 and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

With respect to none of said named persons is there any evidence in the record showing that respondent or any of its foremen or other supervisory employees had any knowledge on the respective dates of layoffs of said persons that they or any of them were then members of the union, or that they or any of them had joined or assisted the union or had engaged in concerted or any activities for the purpose of collective bargaining or other mutual aid or protection.

As an example which may be applied to all of said men, there is no evidence in the record showing that at the date of Mr. McNutt's layoff on June 3, 1937, either his foreman or any other supervisory employee of respondent had knowledge of any union activities on his part, or that he had joined the union or even made application to join. The evidence does show that Mr. McNutt attended the June 1 meeting at which the foremen were present, but there is no evidence that Mr. McNutt took any part in the meeting during the time the foremen were there.

Mr. McNutt testified as follows concerning the June 1 meeting:

Q. They were at the meeting of June 1st?

A. Correct.

Q. You stated that Mr. Bodine, Mr. Gantz, Mr. Baer, and the Pit Foreman—what is his name? A. Mills.

Q. —and Mr. Mills were present.

A. Yes.

Q. Where was that meeting held?

A. In the American Legion Hall at Elsinore.

Q. At Elsinore? A. Yes, sir.

Q. Did you have notice of that prior to the meeting?

A. The organizer had put out notices.

Q. Did you talk with any of these men at the time of that meeting?

A. No, sir. Not until after the meeting.

Q. You did talk with them after the meeting?

A. We discussed the things there after the meeting, of course.

Q. Did they participate in the discussion?

A. Who do you mean by they?

Q. I mean these men I have just named?

A. I don't know what they had to say at the meeting. I did not talk with them.

Q. Did they participate during the meeting?

A. No, sir.

Q. They had nothing to say during the meeting? A. No, sir.

Q. You knew they were there? A. Yes.

Q. Did you invite them to come in?

A. I had nothing to do with the meeting.

Q. Who did call that meeting?

A. Mr. Greene.

Q. Mr. Greene? A. Yes.

Q. That meeting was perfectly friendly, was it? A. Yes.

Q. No statements were made by any of these parties during the course of the meeting?

A. Not to my knowledge.

The next meeting of the union was not until June 5, two days after Mr. McNutt had been laid off. It was at that meeting, not the June 1 meeting, that Mr. McNutt was elected Secretary-Treasurer.

The record shows that Mr. Greene, the organizer from Los Angeles, was the only one who talked at the meeting during the time the foremen were present, except for a few questions that were asked from the floor, the questioners, however, being unidentified. (P. 6,474)

The only support, therefore, for the finding in question that at the time Mr. McNutt was laid off, his union activities were known to the supervisory employees of respondent is LESS than an inference and only a SUSPICION. In other words, it is state-

ment of a suspicion that since he attended the June 1 meeting, even only as a spectator, and since the foremen were present at the meeting, his layoff two days later must therefore have been bcause of his presence at the meeting; and the same reasoning is indulged in the findings as to the layoffs of all of the men referred to.

The Examiner draws this conclusion despite the silence of the record as to whether the men in question, other than McNutt, were seen at the meeting by any of the foremen, and despite the uncontradicted evidence introduced by respondent that the layoffs commencing on June 2nd were the culmination of a plan adopted by the company for a long time prior thereto, to cut down operating personnel because of declining business. (P. 502)

Furthermore, the evidence shows with respect to Henry Boontjer, Arnold Moss, and James Grier, that none of them even attended the June 1 meeting (P. 145, 310, 316), and therefore since the record shows no other evidence of any nature whatsoever that respondent or its foremen knew or had reason to know that either said Boontjer, Moss, or Grier, at the time of their layoffs had any connection with the union, the finding that they were selected for layoff by respondent because of union activities as aforesaid is wholly unsupported by the evidence.

It is proper here to note that the Trial Examiner has failed to make any express finding concerning the condition of respondent's business prior to and up to the date of the first layoffs, but by his failure

to refer thereto he has impliedly found that none of the evidence introduced by respondent showing the decline of respondent's business as the reason for the layoffs is entitled to any credence.

With respect to the layoffs in general, Mr. Bodine, the plant superintendent, testified that he was told by Mr. Larson to keep the oldest men from one standpoint, and their value to the company for the other. (Tr. 477)

He further testified that Mr. Larson discussed the necessity of having to cut down on personnel as early as the first part of May, 1937 (Tr. 502), and that further, as far as he was concerned, there was no connection between the union meeting on June 1 and the layoffs commencing shortly thereafter (Tr. 512), and that in carrying out instructions from Mr. Larson he conferred with Baer and Gantz as to whom they would suggest be laid off, the only point being to keep the greatest efficiency in the organization. (Tr. 626)

The evidence shows that for some time prior to the layoffs, respondent's business had been falling off substantially (Respondent's Exhibit No. 11), (Tr. 696, 816, 817, 818, 820 and 821); it also shows without contradiction that as testified to by Mr. Bodine and by Mr. Larson, the respondent had about April 1, 1937, completed the construction of its new tunnel kiln (Tr. 662), having a capacity of 12,000 fire brick per twenty-four hour period, and which had been in the course of construction for several months theretofore, and in the construction

of which had been used on the average of twenty men (Tr. 662), and that upon the completion thereof the men used in constructing it were not only released for other production work, but the tunnel kiln itself being then operated continually until June 11, the date of the strike, greatly increased production of respondent's products (Tr. 655), and the testimony further shows that not only was respondent's stock of standard clay products up to normal on June 1, 1937 (Tr. 654), but had respondent continued to keep its other facilities in addition to the new tunnel kiln in operation to the same extent as before, the effect would have been an overstocking of inventory (Tr. 656). The respondent's judgment in this matter of cutting down operations and personnel was vindicated by the actual orders for products received by respondent, and the sharp decline in amount thereof in May and June, 1937, (Respondent's Exhibit No. 11).

Respondent further submits that the granting by respondent of a general wage increase of 2½¢ an hour to all of its employees, effective June 1, 1937, was not inconsistent with the plan previously decided upon of curtailing operations and reducing operating personnel at or about the same time, nor is it inconsistent with the business condition and decline in orders which prompted this latter action. As testified to by Mr. Larson (Tr. 432, 433), although prior to the N.R.A. it had been the practice of respondent to lower wages during bad times, and to raise wages during good times, since the N.R.A.

the policy of respondent has been to pay the highest wage of any of the clay products companies in the territory, and if the other clay products companies raise wages it has been the policy of respondent to do likewise, even if respondent's business at the time is slack.

Concerning the granting of said general pay increase we quote the following testimony:

> Q. Was a general pay increase granted the employees on the first of June?
>
> A. No. It was granted in the middle of April.
>
> Q. But it was to become effective the first of June?
>
> A. For me to use my judgment.
>
> Q. And in your judgment conditions warranted the grant on June 1?
>
> A. I wanted to be sure first, to find out whether the other clay products companies had —they had both raised the wages, and I found out how they had done it, so as soon as I found out, I raised the minimum, the same as they did, and all the way up the line. That is the reason—I couldn't find out by May 1, and it took to June 1.
>
> Q. Oh, I see. The Board of Directors then authorized you to make a study and then, when the conditions warranted it, to make the increase when you thought it best? A. Yes.
>
> Q. Was the meeting of the board of directors held in April that authorized that increase?
>
> A. It was.

Q. And in your opinion June 1 was the proper time for the increase to go into effect?

A. I found out from the other clay products how much they had raised, and as soon as I found it, I done it. I increased it June 1. I found out the middle of June, or maybe the first part of June.

Q. You said "June". Is that—do you mean May? A. May. (Tr. 429, 430)

A further analysis of the evidence will demonstrate the complete lack of discrimination because of union activities in the layoffs of respondent during the period in question, to-wit: from June 2 to and including June 10, 1937.

The uncontradicted evidence shows as follows:

(1) That the total number of men employed by respondent as of June 1, 1937, was 164. (Respondent's Exhibit No. 8)

(2) That of that number, 118 employees or 72% between June 1 and June 14, 1937, became members of the union (Respondent's Exhibit 1) and 68 employees or 28% remained non-union.

(3) That the total number of men laid off between June 2 and June 10, 1937, was 43. (Respondent's Exhibit 1)

(4) That of this total number of men laid off it was later determined that 35 or 81.2% were union men, and 8 or 18.8% were non-union men. (Respondent's Exhibit 1)

The similarity in percentages is strikingly apparent and demonstrates the uniformity of layoffs

compared to the total number of men employed and the total layoff. In analyzing these figures it must be borne in mind, as hereinbefore stated, that at the time of the layoffs respondent actually had no knowledge as to which of its men were union members and as to which of its men were not. It is submitted that the foregoing figures demonstrate that in fact there was no discrimination in layoffs as between union and non-union men.

It is interesting at this point to note with reference to one of the men found to have been discriminatorily laid off, to-wit: Arnold Moss, that although it was found by the Trial Examiner that he joined the union on June 2 and the transcript at page 310 shows he so testified, the witness saying that he joined "at Ed Hannum's house", his application card, being part of Board's Exhibit B5, bears June 5 as the date of his application for membership in the union. Furthermore, he testified that the first union meeting he attended was the meeting of June 5. These facts are significant because, as the evidence shows (Respondent's Exhibit 1), Arnold Moss was laid off on June 3. His layoff, therefore, was two days before he formally applied for membership in the union and the very next day after he says he joined the union at Ed Hannum's house. In light of this state of the record, respondent submits that a finding that Arnold Moss was laid off because of union activities is wholly unsupported, there being no evidence of any character that respondent or its foremen or other supervisory employees had any

knowledge or even any means of knowing that he had "joined" the union at the time of his layoff. In fact, it is quite apparent from the record that he did not in fact join the union until June 5, when he signed his application card under that date, his statement that he joined at Ed Hannum's house to the contrary notwithstanding.

(4) Respondent excepts to the findings commencing on page 7, to and including page 13, of said intermediate report, wherein it is found that Laurence McNutt, Edward E. Hannum, Sylvester Osborne, Lester Hazelton, Henry Boontjer, Thomas A. Roddy, William C. Ashworth, Lawrence German, Lucas, Arnold Moss, James Grier, Frank German, Art Hannum, Gerald Wenker, and Glenn Stewart have since June 25, 1937, been refused employment by respondent for the reason that they and each of them joined and assisted the union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

As in the case of the layoffs, respondent submits that the evidence shows a complete lack of any discrimination on its part in the rehiring of its employees after the strike and in its failure or refusal to rehire the employees hereinabove named. The evidence does show that of a total of 55 employees rehired between June 11 and June 24, 1937, said period being the time within which the strike was in effect, 28 were later by respondent ascertained to have been union men and 27 to be non-union men; and further, of the total of 113 employees of re-

spondent rehired during the months of June and July, 1937, 84 or 74% were later ascertained by respondent to have been union men and 29 or 26% to have been non-union men. (Respondent's Exh. No. 1, and Board's Exh. No. 5). It is equally interesting here to note that respondent likewise rehired its employees in almost exactly the same ratio as used by it in its layoffs, and furthermore that the ratio of rehiring between union and non-union men is likewise strikingly similar to the later determined ratio of all union and non-union men in its employ as of June 1, 1937.

Respondent respectfully submits that these uncontradicted figures which are a part of the record of this case do not comport and are utterly inconsistent with the idea of discrimination. It is also respectfully submitted that had respondent reemployed all of the above named union employees and rejected the application for reemployment of a like number of non-union employees, it would have been indefensibly guilty of having discriminated against its non-union employees. Instead, the evidence is consistent only with a plan of both layoffs and rehiring wherein the question of union affiliation played no part whatsoever.

It is also clear from the evidence that the reemployment of all of the complainants herein was not warranted by the condition of respondent's business and operations. The uncontradicted evidence shows that in no month since June, 1937, were there as many men employed by respondent as at the end of

May, 1937, the greatest number of men on respondent's payroll in that period being 152 in September, 1937, 13 less than the May 31st payroll. (Respondent's Exhibit No. 9)

Further with reference to the question of layoffs, we repeat that the only basis for the Examiner's finding that the layoffs were because of union activities is the MERE COINCIDENCE that the layoffs followed shortly after the first union meeting of June 1, which some of respondent's foremen attended, the unwarranted assumption of the Examiner being that since the men were present at the meeting they must have been seen by the foremen and having been seen there, and for that reason alone, they were summarily thereafter laid off. But the fact is, as disclosed by the record, that Sylvester Osborne, for instance attended the first meeting and yet he was not laid off (Tr. 116); that Chester Lucas attended the June 1 meeting, but he was not laid off (Tr. 286); that Frank German also attended the June 1 meeting and he was not laid off (Tr. 332); that Sam Dabich attended the June 1 meeting and he was not laid off (Tr. 385).

Likewise, with respect to the question of rehiring, the Trial Examiner's finding in that regard that respondent discriminated against and refused reemployment to the employees hereinbefore named because of their union activities, is also predicated merely upon the assumption that if they were in

the picket line they must have been seen there by respondent's foremen, or upon the fact that their names appeared on the list of men attached to Board's Exhibit 4. Yet it is also interesting to point out that in the case of foreman Jack Baer, he reemployed many of the men whom he had seen on the picket line (Tr. 713, 714), naming fifteen such men at random in his testimony, to-wit: Chamberlain, Chon Villa, Pete Bernard, Jr., Paul Ortega, Joe Acosta, Sam Dabich, Chris Anaya, Fierro, Frank Castillo, Pete Bernard, Sr., Jesus Rios, F. Maldonardo, Jose Arsiga, Pete Jiminez, Luis Juarez. Furthermore, although Mr. Baer made his selections on the witness stand using respondent's Exhibit 1, the names of all the men he selected, with one exception, to-wit: Frank Castillo, appear on the list of union men attached to Board's Exhibit 4.

Further, foreman Jack Baer reemployed one man, to-wit: Leland (O. L.) Fuller, when he knew that Fuller had joined the union because Fuller had told him so (Tr. 718).

Can it therefore justifiably be said or found, as by the Trial Examiner, that in the case of foreman Jack Baer his failure to reemploy Arnold Moss, Thomas A. Roddy, and Art Hannum (Tr. 715, 716) was because of THEIR union activities? Obviously, such a finding is unsupported by the evidence.

It is extremely important to note also that the evidence shows that of the four officers of the union,

two of them, namely, Luis Juarez, vice president, and Mark Damron, doorman, were reemployed by respondent, and the record shows that not only were these two officers but they were active members of the union (Tr. 110), and known to be such by respondent, they having been members of the committee which presented the petition dated June 9, 1937 (Board's Exhibit 2) to Mr. Bodine, respondent's plant superintendent on June 10, 1937 (Tr. 505).

(5) Respondent further particularly excepts to the findings appearing on page 14 of said Intermediate Report, wherein it is found:

> "I find that respondent did, on or about July 7, 1937, reinstate Sam Dabich, but did deprive him of rights and privileges previously enjoyed by him, and did reduce his rate of pay and wages and did assign him to a job other than the job which he had held prior to June 11, 1937.
>
> "I further find that respondent deprived the said Sam Dabich of rights and privileges previously enjoyed by him and reduced his rate of pay and wages, and assigned him to a job other than the job which he had held prior to June 11, 1937, for the reason that he joined and assisted the Union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection."

for the reason that said findings are and each of them is wholly unsupported by any substantial evidence in the record.

The evidence does show that Mr. Dabich joined the union on June 1, but it is significant to note that he was not laid off, but that he went out on strike on June 11. Unlike many of the other employees involved herein, Mr. Dabich was seen and spoken to while on the picket line by Mr. Bodine. (Tr. 389) Although the evidence does show that upon the first occasion when he asked Mr. Bodine for reemployment he was refused, he was actually given reemployment the very next day by Mr. Larson, respondent's general superintendent. (Tr. 387) Furthermore, the evidence shows that whereas he was reemployed as a brick setter in the tunnel kiln (Tr. 388) instead of in his old job greasing and oiling machinery (Tr. 384-385), he was perfectly satisfied with the change in the job that was given to him (Tr. 388), and further that Mr. Dabich knew at the time of his reemployment that his old position oiling and greasing machinery had not been filled by respondent. Mr. Dabich testified as follows:

> Q. (By Mr. Howlett) Mr. Dabich, when you went back to work did you have any convesation with Mr. Bodine as being satisfied with what job was given to you? A. No, sir.
>
> Q. Were you satisfied? A. I was.
>
> Q. Do you know who filled the job that you had before?

A. No, I don't think they got anybody on that job. (Tr. 388)

* * * * * * *

Q. So the job you were doing before has never been filled since?

A. Not that I know.

Q. You are working there now?

A. At the brick yard?

Q. Yes. (Tr. 389)

* * * * * * *

Q. What did Mr. Larson say to you?

A. Well, he told me he put me on, you go tomorow morning, so I did.

Q. Was he friendly at that time?

A. Yes, sir.

Q. And did he say anything to you about being in the picket line? A. No, sir.

Q. Did he say anything to you about being a member of the union? A. No, sir. (Tr. 390-391)

With reference to the testimony of Mr. Dabich that at the time he was reemployed Mr. Bodine told him he was starting in like a new man, we call the Board's attention to the following testimony of Mr. Bodine, which belies the idea of discrimination sought to be attached to that statement by the Trial Examiner in his findings:

Q. (By Mr. Mauritsen) Did you or did you not make a statement to Mr. Dabich that he was beginning as a new man when he applied for re-instatement?

A. I can't recall as having made such a statement. But, if I made such a statement, I would have meant by that that coming back as a new man, he would have to take the job we had open for him, and we didn't, we couldn't put him back on the job he had been on.

Q. Did you mean thereby that he lost any seniority that he might have had at the plant?

A. No; no.

Q. In other words, you, although he had gone out on strike, still regarded him as an employee of the company, did you not?

A. The same seniority as he had when he went out. (Tr. 484-485)

The attention of this Honorable Board is called particularly to the statements of Mr. Larson, general superintendent of respondent, that he is willing and has at all times been willing to take the complainants herein back to work:

Q. It has been testified here that there are a number of men that were laid off and a number of men that left the work, struck on June 11, 1937. Referring to both groups, are you willing to take those men back to work?

A. We are.

Q. Under what conditions?

A. Under the condition that they are good workers, qualified for the work they are asked to do.

Q. Do I understand you to say that you will take them back whether you have the work or not?

A. Providing we have got work for them. (Tr. 678, 679)

* * * * * * *

Q. Now, Mr. Larson, you stated that you are willing to take these men who joined the union back. Did you not? A. Yes, sir.

Q. That is you are willing at this time to take them back? A. I am.

Q. Were you willing to take these men back in June? A. Always have been willing.

Q. Were you willing to take them back in July? A. Always.

Q. Were you willing to take them back in August? A. Always.

Q. Mr. Larson, why were new men employed rather than the Union men during all this time?

A. Well, I will explain. There might be exceptions, one or two. When we needed men, suppose we needed men, we wanted to keep the machinery running and when orders came in we may have been needing ten or fifteen men to take care of eight or ten men that were sick or maybe we get a small manufacturing order to make quick; we may take some men and we haven't got time to mail postal cards or to run over the country to help the men to come back. If the men are so anxious to come back, they

ought to come to the plant and look for work, not sit around in the kitchen, because we are not going after them. (Tr. 687, 688)

III.

Exceptions to Conclusions and Recommendations.

Respondent excepts to the conclusions of the Trial Examiner, and each of them, as set forth in paragraphs 1, 2 and 3, at pages 15 and 16 of the Intermediate Report, and excepts to each and every recommendation as set forth in paragraphs 1, 2 and 3 of said Report, appearing at pages 16, 17 and 18 thereof, for the following reasons:

(1) That said conclusions and recommendations, and each of them, are and is of no force or effect, said Trial Examiner and this Honorable Board being without jurisdiction or authority to either make or enforce said conclusions and recommendations, or any of them.

(2) That said conclusions and recommendations, and each of them, are and is unwarranted by the evidence and unsupported thereby.

Respondent therefore respectfully requests that for all of the reasons hereinbefore stated, the complaint herein and all proceedings had thereon be forthwith dismissed.

Respectfully submitted,

ELLIS, HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent

No. 9218

In the United States Circuit Court of Appeals for the Ninth Circuit

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
LOS ANGELES BRICK & CLAY PRODUCTS CO.,
RESPONDENT

ON PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

CHARLES FAHY,
General Counsel.
ROBERT B. WATTS,
Associate General Counsel.
LAURENCE A. KNAPP,
Assistant General Counsel.
BERTRAM EDISES,
RAMEY DONOVAN,
Attorneys,
National Labor Relations Board.

FILED
OCT 1 6 1939
PAUL P. O'BRIEN,

CONTENTS

	Page
Jurisdiction	1
Statement of the case	2
Proceedings before the Board	2
The Board's findings of fact, conclusions of law, and order	5
Summary of argument	7
Argument:	
Point I. The National Labor Relations Act is applicable to respondent and the employees here involved	9
Point II. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the act	19
A. The respondent's attitude toward the Union	19
B. The refusal to bargain collectively	23
C. The lay-offs and the refusals to reinstate	30
D. The discriminatory refusals to reinstate individually considered	32
E. Recapitulation	47
Point III. The Board's order is wholly valid and proper under the act	48
A. The cease-and-desist provisions	48
B. The affirmative provisions	49
Conclusion	51

AUTHORITIES CITED

Cases:

Adams Manufacturing Co. v. *Storen*, 304 U. S. 307	12
Black Diamond S. S. Corporation v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2), cert. den., 304 U. S. 579	29, 50
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	16, 20, 48
Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434	12
Houston E. & W. Texas Ry. v. *United States*, 234 U. S. 342	18, 19
Jeffery-DeWitt Insulator Co. v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4), cert. den., 302 U. S. 731	29, 50
The Minnesota Rate Cases, 230 U. S. 352	17, 19
Mulford v. *Smith*, 307 U. S. 38	18

183781—39——1

Cases—Continued. Page

Nashville C. & St. L. Ry. v. *Railway Employees Dept. of A. F. of L.*, 93 F. (2d) 340 (C. C. A. 6) ---------- 36
National Labor Relations Board v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9), cert. den., 306 U. S. 643 ---------- 49, 50
National Labor Relations Board v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9) ---------- 29, 49, 50
National Labor Relations Board v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. den., 304 U. S. 575 --- 20, 29, 49, 50
National Labor Relations Board v. *Crowe Coal Co.*, 104 F. (2d) 633 (C. C. A. 8) ---------- 16
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601 -- 14, 16, 17, 49
National Labor Relations Board v. *Hearst*, 102 F. (2d) 658 (C. C. A. 9) ---------- 20
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 ---------- 13, 48, 49
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 ---------- 29, 48, 49
National Labor Relations Board v. *National Motor Bearing Co.*, decided June 2, 1939 (C. C. A. 9) ---------- 49, 50
National Labor Relations Board v. *Oregon Worsted Co.*, 98 F. (2d) 193 (C. C. A. 9) ---------- 49, 50
Naional Labor Relations Board v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272 ---------- 19, 20
National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 ---------- 20, 48, 50
National Labor Relations Board v. *Planters Mfg. Co.*, 105 F. (2d), 750 (C. C. A. 4) ---------- 16, 18
National Labor Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), cert., den., 304 U. S. 576 --- 50
National Labor Relations Board v. *Santa Cruz Fruit Packing Co.*, 91 F. (2d) 790 (C. C. A. 9), affirmed, 303 U. S. 453 - 16, 18, 48
Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453 ---------- 16, 18
Second Employers' Liability Cases, 223 U. S. 1 ---------- 17
Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board*, 301 U. S. 142 ---------- 20
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 ------ 12

Board cases:
Matter of Kuehne Mfg. Co., 7 N. L. R. B. 304, 323 ------- 36

Statutes:
National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) ---------- 1
California Retail Sales Tax Act (Cal. Stats. 1933, p. 2599 *et seq.*, and amendments) ---------- 12

In the United States Circuit Court of Appeals for the Ninth Circuit

October Term, 1938

No. 9218

National Labor Relations Board, petitioner

v.

Los Angeles Brick & Clay Products Co.,
respondent

ON PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case comes before the Court upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). Respondent is a California corporation operating a plant at Alberhill, Riverside County, California, where the unfair labor practices occurred.

STATEMENT OF THE CASE

Proceedings before the Board

Upon charges and supplemental charges filed by Alberhill Clay Products Workers' Union No. 373 (hereinafter called the Union), the Board, through its Regional Director at Los Angeles, California, on December 9, 1937, issued its complaint and notice of hearing, which were served upon respondent and the Union.

In addition to jurisdictional allegations the complaint alleged in substance that between June 2 and 10, 1937, the respondent discharged 13 employees, and thereafter refused to reinstate them because they joined and assisted the Union; that on or about June 25 respondent reinstated two named employees but, because of their union membership and activities, reduced their pay and deprived them of rights and privileges which they had previously enjoyed; that on or about June 10 and thereafter respondent refused to bargain collectively with the Union; and that by the foregoing and other acts and conduct respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act (R. 4–14).

A hearing was held at Riverside, California, on December 16, 17, 20, 21, and 22, 1937, before Dwight Stephenson, the Trial Examiner designated by the Board (R. 34–35). The Board and the respondent

were represented by counsel and participated in the hearing. The Union was represented by its international organizer and likewise participated in the hearing. On the opening day of the hearing respondent filed a motion to dismiss the complaint on the ground that the Board had no jurisdiction of the subject matter (R. 31–34). The Trial Examiner denied this motion at the conclusion of the hearing (R. 557). Counsel for the Board, on the first day of the hearing, moved to amend the complaint to include the name of Henry Boontjer among the employees alleged to have been discriminated against. The motion was allowed by Trial Examiner (R. 207). The Board's counsel also moved to dismiss without prejudice the allegations of the complaint as to eleven named persons on the ground that they had failed to appear at the hearing. This motion was allowed by the Trial Examiner (R. 500–502).

On April 30, 1938, the Trial Examiner issued an Intermediate Report, which was filed with the Regional Director and duly served upon all the parties, finding that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act (R. 35–59). He recommended that the respondent cease and desist from its unfair labor practices; reinstate, with back pay, certain of its employees found to have been discriminated against in re-

gard to hire and tenure of employment; upon request, bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit; and take certain other appropriate action to remedy the situation brought about by the respondent's unfair labor practices. The Trial Examiner also recommended dismissal of the complaint, as amended, as to M. G. and M. J. Eaglin on the ground that they had failed to appear and testify at the hearing.[1] On May 11, the Union filed exceptions to the Intermediate Report.[2] The Board accorded respondent and the Union an opportunity for oral argument before the Board, but neither party availed itself of the privilege (R. 59). On February 27, 1939, the Board issued its Decision, affirming the rulings of the Trial Examiner and setting forth its findings of fact, conclusions of law, and order (R. 60–103).

---

[1] There was no recommendation as to the dismissal of Gregorio Cordero's name from the complaint, although the Trial Examiner failed to find that he had been discriminated against (R. 56–58).

[2] While the Trial Examiner found Chester Lucas and Art Hannum to have been discriminated against in regard to hire and tenure of employment, their names were omitted from his recommendations. No recommendations were made with respect to Sam Dabich whom the Trial Examiner also found to have been discriminated against in violation of the Act (R. 56–58). The exceptions of the Union pertained to these omissions from the Trial Examiner's conclusions and recommendations.

The Board's findings of fact, conclusions of law, and order

Respondent's business.—Briefly, the Board found that respondent is a California corporation engaged in the business of manufacturing, selling, and distributing brick, tile, sewer pipe, and flue lining. Its plant is located at Alberhill, Riverside County, and its principal office is located at Los Angeles, both in the State of California. All respondent's raw materials are procured from sources in California. The gross annual sales of respondent amount to approximately $500,000. During the first 11 months of 1937 its total net sales of finished products amounted to $463,671. Of this amount of finished products, approximately 18.6 percent, valued at about $86,345, were sold for shipment or shipped by the respondent to destinations outside California (R. 66–67).

The unfair labor practices.—The Board found that respondent had discriminated in respect to the reinstatement of 17 named employees who had gone on strike and that respondent had thereby discouraged membership in the Union. The Board also found that respondent prolonged the strike by refusing, on June 15, 1937, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of respondent's employees. By the foregoing conduct the Board concluded that respondent had engaged in and was

engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act (R. 68–94).[3]

The Board's order.—The Board ordered respondent to cease and desist from refusing to bargain collectively with the Union and from discouraging membership in the Union or any other labor organ-

---

[3] The pertinent provisions of the Act are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

*   *   *   *   *

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

*   *   *   *   *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

*   *   *   *   *

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

ization by discrimination in regard to hire and tenure of employment. As affirmative action which the Board found will effectuate the policies of the Act, the Board required respondent to reinstate with back pay 15 of the employees who had been found to have been discriminated against in reinstatement.[4] The Board further directed that respondent, upon application, reinstate 21 other employees who were on strike on June 15, 1937, the date of respondent's refusal to bargain collectively; and that respondent post appropriate notices (R. 99–103).[5]

SUMMARY OF ARGUMENT

I. The National Labor Relations Act is applicable to respondent and the employees here involved.

II. The Board's findings of fact are supported by substantial evidence. Upon the facts so found,

---

[4] Cordero and Dabich, two of the 17 employees found to have been discriminated against, were later reinstated by respondent (R. 91–94). Hence they were not included in the reinstatement order.

[5] The Board's order in full is as follows:

"Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Los Angeles Brick & Clay Products Co., its officers, agents, successors, and assigns, shall:

"1. Cease and desist from—

"(a) Interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to

183781—39——2

respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subdivisions (1), (3), and (5) of the Act.

III. The Board's order is wholly valid and proper under the Act.

---

form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act;

"(b) Refusing to bargain collectively with Alberhill Clay Products Workers' Union No. 373 as the exclusive representative of its employees at the Alberhill plant, including the pits, excluding foremen, supervisors, and office employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

"(c) Discouraging membership in the Union or any other labor organization of its employees, by discriminating in regard to hire and tenure of employment because of membership in or activity on behalf of the Union or any other labor organization.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer to those employees listed in Appendix 'A,' and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section entitled 'Remedy' above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

"(b) Make whole the 15 employees named in Appendix 'A' for any loss of pay each may have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to each of them, respectively, of a sum of money equal to the amount each normally would have earned as wages from September 1, 1937, to the

ARGUMENT

Point I

The National Labor Relations Act is applicable to respondent and the employees here involved

The facts upon which the Board based its findings with respect to the nature of respondent's

---

date of the offer of reinstatement, less his net earnings during said period; deducting, however, from the amount otherwise due each said employee, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county. municipal, or other government or governments which supplied the funds for said projects;

"(c) Upon application, offer to those employees, who were on strike on June 15, 1937, and thereafter, and who are not named in Appendix 'A,' and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in the section entitled 'Remedy' above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section; and thereafter, in said manner, offer them employment as it becomes available;

"(d) Make whole the employees ordered in paragraph (c) above to be offered reinstatement for any loss of pay they will have suffered by reason of the respondent's refusal to reinstate them, upon application, following the issuance of this Order, by payment to each of them, respectively, of a sum of money equal to that which each normally would have earned as wages during the period from 5 days after the date of such application for reinstatement to the date of the offer of employment or placement upon the preferential list required by paragraph (c) above, less his net earnings during said period: deducting, however, from the amount otherwise due each said employee, monies received

operations are not in dispute. The respondent is engaged at Alberhill, Riverside County, California, in the manufacturing, selling, and distributing of brick, tile, sewer pipe, and flue lining (R. 5, 15). The principal office of respondent is in Los Angeles (*ibid.*). All its raw materials are procured from sources in California (R. 15–16).

Respondent's gross annual sales amount to about $500,000 (Resp. Exh. 5, R. 481). During the first 11 months of 1937, its total net sales of finished products amounted to $463,671 (Resp. Exh. 5, R. 481). Of this amount the respondent sold and delivered to points outside California products valued at $32,149 (Resp. Exh. 7, R. 483–

---

by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said project;

"(e) Post immediately, and keep posted for a period of at least sixty (60) consecutive days from the date of posting, notices in conspicuous places in and about the plant, including the yard and the pits, stating in both English and Spanish that the respondent will cease and desist in the manner set forth in 1 (a), (b), and (c), and that it will take the affirmative action set forth in 2 (a), (b), (c), (d), and (e) of this Order; and

"(f) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

"And it is further ordered that the complaint, insofar as it alleges that the respondent discriminated in regard to the terms and conditions of employment of Sam Dabich, be, and the same hereby is dismissed."

484). Respondent further sold and delivered products valued at $40,771 to purchasers for intended shipment outside California, such intention being set forth on the purchase orders (R. 814, 807, Bd. Exh. 12, R. 491–495). During the same period about $13,425 worth of finished products also were sold and delivered to railroads for intended shipment outside California (Bd. Exh. 14, R. 498–499). Thus, during the period under consideration, approximately 18.6 per cent of the respondent's finished products, amounting to about $86,345 in value, were sold for shipment or shipped by respondent to destinations outside of California.

The Board's findings as to the interstate character of respondent's operations were, as we have pointed out, based in part upon the $54,196 worth of respondent's products purchased by respondent's customers for intended shipment out of the State of California (Bd. Exhs. 12 and 14, R. 491–495, 498). While conceding the accuracy of this figure (R. 490, 497) respondent contends that the Board was not entitled to consider such shipments in determining the question of jurisdiction, on the ground that the record does not show that the products were actually shipped to out of state points (Resp. Exceptions to Intermediate Report, p. 6). The objection, it is submitted, is without merit.

The evidence of intention to ship these products outside of California upon which the Board relied

is the statements of respondent's customers appearing upon their purchase orders (R. 551).[6] Manifestations of intention in the realm of commercial dealing and practice, especially when disinterestedly made, may not be readily ignored. Clearly, an expression of a purpose to make an extra-state shipment, made in the regular course of business and appearing upon an ordinary commercial document, raises a presumption that the intention was carried out.[7] It is important to note that there is not the slightest evidence in the record casting

---

[6] While the record does not show the precise purpose for which this information is set forth on the purchase orders, there is reason to believe that the data pertains to the matter of exemption from California's Retail Sales Tax Act (Cal. Stats. 1933, p. 2599 et seq., and amendments), Section 5 of which specifically excludes from the operation of the act sales which the state is prohibited from taxing "under the Constitution or laws of the United States of America * * *," a provision which, of course, applies to sales of goods for shipment in interstate commerce. *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 311–312; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438–439; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255. In this view the data as to intended destination appearing on the purchase orders is of an official character and its trustworthiness is correspondingly enhanced. See R. 505–506; cf. Resp. Ex. 5, R. 481.

[7] "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence." Wigmore, *Evidence* (2d edition), Vol. I, Sec. 102, p. 336.

doubt upon the genuineness of this expression of intention or in any way tending to rebut the presumption that the purchasers who thus signified their purpose to ship out of the state, actually did so. Particularly in view of the entire absence of any contradictory showing, the Board was fully justified in considering these purchases as interstate transactions, and in basing its jurisdictional determination in part thereon.

Upon the facts set out above, the Act is plainly applicable to respondent and the employees here involved. The test of the Act's application to an industrial concern is whether "stoppage of * * * operations by industrial strife" in the enterprise under consideration would result in interruption to or interference with the flow of interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. If such interruption would occur, unfair labor practices, shown by long experience to be "prolific causes of strife," have the "close and intimate effect" which brings the subject within the reach of the Federal power to regulate commerce among the States (301 U. S. 1, at 38, 42).

The $86,345 worth of finished products which respondent sold for shipment or shipped to points outside California during the period under consideration constitutes a substantial quantity of goods, by any standard. That a cessation of shipments of such magnitude through industrial strife

at respondent's plant would "directly and substantially" affect interstate commerce is clear. The decision of the Supreme Court in *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, is decisive upon this point. In that case the Act was held applicable to a small manufacturer of women's clothing whose total output was about a thousand dozen garments per month. "Nor do we think it important," said the Court in the *Fainblatt* case—

> that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. *Hanley* v. *Kansas City Southern Ry. Co.,* supra. The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.
>
> The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the juris-

> diction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved.

After examining the language of Section 2 (6) and (7), wherein the scope of the Act's application is set forth, the Court went on to say:

> The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.

Since the more than $80,000 worth of products which respondent shipped or sold for shipment to points outside California obviously cannot be considered trifling, and hence within the maxim *de minimis non curat lex,* it necessarily follows that the protective power of Congress, as embodied in the Act, may properly be extended to respondent

183781—39——3

and the employees here involved. The same result follows even if, contrary to the holding of the Supreme Court in the *Fainblatt* case, *supra,* we exclude from consideration the commerce of respondent's customers, and consider only the $32,149 worth of finished products which respondent, in the 11-month period under consideration, itself sold and delivered to points beyond the border of the state. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.,* 91 F. (2d) 790 (C. C. A. 9), affirmed 303 U. S. 453; *National Labor Relations Board* v. *Crowe Coal Co.,* 104 F. (2d) 633 (C. C. A. 8); *National Labor Relations Board* v. *Planters Mfg. Co.,* 105 F. (2d) 750 (C. C. A. 4).

The fact that the amount of brick and tile produced by respondent for shipment in interstate commerce is smaller than the amount which remains within the state is of no consequence. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 221; *National Labor Relations Board* v. *Crowe Coal Co.,* 104 F. (2d) 633 (C. C. A. 8); *National Labor Relations Board* v. *Planters Mfg. Co.,* 105 F. (2d) 750 (C. C. A. 4). In the *Santa Cruz* case the Supreme Court held that a concern which shipped 37 percent of its product in interstate commerce was subject to regulation under the Act. In so holding the Court condemned the use of a me-

chanical percentage test in determining whether the Federal power could apply, stating (303 U. S. at 467):

> It is plain that the provision cannot be applied by a mere reference to percentages, and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 percent, and not to more than 50 percent, of its production cannot be deemed controlling.

In the *Consolidated Edison* decision the Court held the Act applicable to the utility companies despite the fact that the "intrastate activities" of the latter were admittedly "predominant" (305 U. S. at 219), and that the interstate aspects of the companies' operations "involve but a small part of the entire service rendered by the utilities" (*Id.,* at p. 221). Had the present respondent produced only the considerable quantity of brick and related products marked for shipment out of the State, it would not be open to question that the requisite "close and substantial" relation to interstate commerce was present. *National Labor Relations Board* v. *Fainblatt, supra.* The relation to commerce is not rendered any less close or substantial because the proper regulation of the interstate aspects of respondent's business necessarily results in the incidental regulation of a larger quantity of intrastate commerce. The governing principle is the supremacy of the federal power within the national field. *Second Employers' Liability Cases,* 223 U. S. 1; *The Minnesota Rate Cases,* 230 U. S.

352; *Houston E. & W. Texas Ry.* v. *United States,* 234 U. S. 342; *Mulford* v. *Smith,* 307 U. S. 38. As the Circuit Court of Appeals for the Fourth Circuit held in *National Labor Relations Board* v. *Planters Mfg. Co.,* 105 F. (2d) 750, 754 (C. C. A. 4):

> The fact that the substantial interstate parts of respondent's business are so closely connected with intrastate aspects, that the regulation of the former is impossible without incidentally regulating the latter, necessarily leads to the extension of the federal regulating power rather than to its restriction.

Similarly, in *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.,* 91 F. (2d) 790 (C. C. A. 9),[8] this Court held:

> * * * *if any substantial percentage of a product produced in a state is produced to enter interstate or foreign commerce, the Congress may regulate its production, insofar as it affects the volume to enter such commerce, though such regulation also regulates a larger percentage of product which does not leave the state.* [Italics the Court's.]

To hold otherwise would deny to Congress the exercise of its constitutional authority, and would be destructive of the fundamental principle of the preeminence of the national government within its appointed sphere. *The Minnesota Rate Cases,*

---

[8] Affirmed, *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453.

supra; Houston E. & W. Texas Ry. v. *United States, supra,* at 350–352. Having chosen to employ the channels of interstate commerce in the carrying on of its business, respondent may not complain if it is required to comply with reasonable regulations enacted by Congress for the protection of those channels against burdens and obstructions. It is, therefore, submitted that under principle and authority the Act is applicable to respondent and to the employees here involved.

Point II

The Board's findings of fact are supported by substantial evidence.[8] Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act

In order to appreciate fully the significance of respondent's actions in refusing to bargain with the Union, and in discriminating against and refusing to reinstate certain union members, it is necessary to consider briefly some of the precursors of the aforementioned activities.

A. The respondent's attitude toward the Union

About May 1, 1937, Bodine, the plant superintendent (R. 118, 467), told an employee named

[8] Section 10 (e) of the Act provides that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Under this provision, as this Court has recognized, the Court, in reviewing the findings of the Board, will not make its own appraisal of the evidence, but will

Hazleton that he thought the Union might come in to organize the plant. "In case the Union comes in here," said Bodine, "there won't be no chance for a bonus this coming year like there was last year" (R. 192, 193). He instructed Hazleton to "spread that word around over the yard among the boys there" (*Id*). Bodine admitted having told Hazleton that he thought "the unions would be coming up to visit us" (R. 438), although he denied that he made any statement about the bonus (R. 437). The Board, however, pointing to the prominent part which the superintendent played in other acts of opposition to the Union, did not believe Bodine's testimony with respect to the Hazleton conversation (R. 70). From the entire record it appears that the Board's position was fully justified.

The first attempt to organize the Union began with a meeting of respondent's employees on June

---

reverse or modify the Board's findings of fact only if they are not supported by substantial evidence. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270, 271; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. den., 304 U. S. 575; *National Labor Relations Board* v. *Pacific Greyhound Lines*, 91 F. (2d) 458 (C. C. A. 9), reversed in other respects, 303 U. S. 272; *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 661 (C. C. A. 9).

1, 1937 (R. 117). The meeting was attended by 50 to 70 of respondent's employees and 33 of these signed application cards for union membership (R. 196, 237; Bd. Exh. 5). Another union meeting was held on June 25 at which officers were elected and additional membership application cards signed (R. 118–121; Bd. Exh. 5). The organizational drive met with notable success and within a short time over 60 percent of respondent's employees had joined the Union (R. 121, Bd. Exh. 5).

That respondent was fully aware of the efforts of its employees to organize is fully established by the record. Indeed, respondent knew in advance that the meeting of June 1 was to be held (R. 286, 350, 450). Numerous supervisory officials of the respondent attended the meeting. Baer, one of the foremen, testified that he arrived late but remained for about 45 minutes (R. 450, 452). Baer also testified that he saw Superintendent Bodine and the other foremen, Mills and Gantz, at the meeting (R. 452). Although the foremen testified that they left shortly after the first group of men began going up to sign union cards, the record shows that at least 15 or 20 employees signed application cards in the presence of the foremen. (R. 320). Pit Foreman Mills admitted that he remained near or in the vicinity of the meeting until it completely disbanded (R. 372). Baer admitted that he had seen and recognized about

20 of the men who worked under his supervision at the plant (R. 456). None of the foremen had been asked to attend the union meeting (R. 350, 370–371, 450), and Baer admitted that he knew he was ineligible for membership (R. 451); he explained that "we attended to merely see * * * what was going on and what the activity was" (R. 451). A day or two after the meeting Bodine reported to Larson, the general superintendent of respondent's plant, that a union was being formed in the plant (R. 352–353).

On the day following the first union meeting, Foreman Gantz argued with Ashworth, one of his subordinates, during "practically the whole noon hour" in an effort to persuade Ashworth to abandon the Union (R. 228). Gantz repeatedly told Ashworth that the employees should have nothing to do with an "outside" union but should form a union within the plant (R. 228). He further stated that the employees were "fools" to allow themselves to be led by a man such as the union organizer who had been present at the meeting on June 1 (R. 228). Later the same day Gantz came up to Ashworth and another employee named McNutt and remarked, "You fellows are fools to affiliate with the C. I. O. or any outside organization. You should form a union yourselves and stay clear of all outside affiliations" (R. 143–144, 229). Gantz admitted that he had spoken to Ashworth and McNutt about the union on June 2, and that he had told them that "if the union was anything

like the talk the speaker made, I don't think very much of it" (R. 384–385). He also admitted that he had seen McNutt at the union meeting on the evening of June 1 (R. 384). McNutt was laid off on June 3, the day following the conversation referred to above (R. 143). Ashworth was laid off on June 8, after which Gantz again remarked to Ashworth, "the mistake you fellows made from the start was joining up with any outside organization whatsoever. You should have just formed an employees' union here in this one plant and stayed clear of all outside affiliations" (R. 229). The lay-offs of Ashworth and McNutt are considered further, *infra*, at pages 32–35.

It is apparent from the above-described conduct of its supervisory employees that the respondent was strongly opposed to the union organization of its employees. The clear antiunion bias thus demonstrated supplies the motive for respondent's subsequent violations of the Act.

B. The refusal to bargain collectively

On or before June 10, 1937, 108 of respondent's employees had signed application cards for membership in the Union and by June 14 ten additional application cards had been signed (R. 143, Bd. Exh. 5). As we have seen, a substantial number had joined the Union at the meeting attended by the foremen (R. 320).

Prior to the beginning of the organizational drive, respondent had announced a general wage

increase, to become effective on June 1 (R. 194, 332–333). On June 2, however, a reduction in force was announced, stated to be for reasons of economy necessitated by slack business conditions (R. 194 Resp. Exh. 2, R. 432). By June 9, 42 employees had been laid off, including a substantial number of members of the Union (Resp. Exh. 1, R. 392; Bd. Exh. 5). One veteran employee testified that never before in his experience had the granting of a raise on one day been followed by a lay-off the next day (R. 189–190, 201). As the result of the lay-offs the Union held a meeting on June 9 and formulated a petition to be presented to the respondent (R. 237–238).

The petition drawn up by the Union requested union recognition, reinstatement of employees laid off after June 1, equitable distribution of work, and time and one-half for overtime (R. 237–238; Bd. Exh. 2, R. 123). A committee of union members gave Bodine the petition at about 7: 30 a. m. on July 10. Copies were also distributed at respondent's Los Angeles office (R. 125, 260, 286). The petition gave the respondent until midnight to reply and stated that absence of notification would be deemed a denial of the requests (Bd. Exh. 2, R. 123). Larson, the general superintendent, was given the petition by Bodine about two and one-half hours after the latter had received it (R. 286).

Lucas, one of the members of the union committee (R. 125), testified that later in the day on which the petition was presented, Bodine called him over

to one side of the shop and told him that the men had no means of backing up their demands and that the company would ignore the petition "and wouldn't have anything to do with it" (R. 261–262). Bodine denied that he made the above statement (R. 440), but the Board, upon the entire record in the case and in the proper exercise of its power to pass upon the credibility of witnesses and to resolve conflicting testimony, refused to credit his denial (R. 73). No further word was received from the respondent by the Union and, early the following morning (June 11) the entire force, with the exception of six men, went on strike in accordance with a vote previously taken by the Union (R. 17, 231–232).

On June 15 (R. 463–464, 222–223), after the commencement of the strike, a meeting was held at the office of the Board's Regional Director to discuss the possibility of settling the controversy. The conference was attended by McNutt, secretary-treasurer of the Union, and other union officials, and by Larsen, on behalf of respondent (R. 131–132, 298). McNutt testified that during the meeting Nylander, the Board's Regional Director, asked Larson if he would bargain with the Union (R. 133). Larson replied that he "would never have a union in his plant if he had to close it down for good," and, pointing at McNutt and another of the union representatives, declared, "those two men [will] never go back to work in [my] plant under any circumstances" (R. 133, 283). As a re-

sult of Larson's intransigent attitude, the attempt at settlement was unsuccessful (R. 178–179).

Larson's version of the conference was that he had met with Nylander, the Regional Director, and Howard, a Field Examiner for the Board, and that they told him the strike was illegal and that they would attempt to have it called off (R. 296–297, 339). He admitted that he had not offered to bargain with the union representatives at the meeting (R. 290), but denied having threatened to close the plant (R. 290). Larson's testimony concerning the conference was such as to throw considerable doubt upon the reliability of his denial. Thus, he testified that he had had two conferences with Nylander and Howard; and that the conference which was attended by the Union representatives and concerning which McNutt testified that Larson had threatened to close the plant rather than recognize the Union, was the last of the series and was held on June 23, two days before the termination of the strike (R. 298–299). Larson testified later that the last conference was held on or about June 28 (R. 340–341).

Other evidence establishes conclusively that the conference referred to by McNutt at which the union representatives were present took place on June 15 and not on June 23 or 24, as Larson testified (R. 462–464). Indeed, respondent's counsel so stipulated (R. 222–223). In view of the contradictions in Larson's testimony and his admission that he made no response to the request to bargain

with the Union, the Board was well warranted in disbelieving Larson and in crediting McNutt's testimony as to what was said at the June 15 conference in the Regional Director's office (R. 74–75).

After the June 15 meeting the Union continued its efforts to induce respondent to negotiate. On June 16 the Union sent a letter to the respondent asking it to select a time and place for a meeting with the Union (R. 127, Bd. Exh. 3, R. 128). Like the previous petition, this letter went unanswered (R. 130). Larson himself testified that at no time did he attempt to meet or negotiate with the men (R. 287–289). In significant contrast is the testimony that Baer, the foreman, told Art Hannum, an employee who was about to leave the plant to join his striking fellow union members, that if the employees had formed a "company union in there or the A. F. of L. that Mr. Larson would have come around and talked business with us but he didn't like the C. I. O. policies" (R. 302). Baer was one of respondent's witnesses but he did not controvert the testimony of Hannum as to this incident (R. 445).

On the same day on which the Union dispatched its unheeded letter requesting a collective bargaining conference, respondent began to rehire employees. During the course of the strike 59 striking employees accepted respondent's offers to return to work (Resp. Exh. 1, R. 392–395). The Union, considering its situation hopeless, thereupon voted to terminate the strike on June 25 (R. 148).

On that day, the Union again wrote to respondent, asking that the Union members, whose names it submitted, be reemployed in order of seniority (R. 134; Bd. Exh. 4, R. 137). Respondent again ignored the Union's communication and, on June 28, began to hire new employees (Resp. Exh. 1, R. 392).

Respondent's principal defenses against the Board's finding that it refused to bargain collectively with the authorized representatives of its employees are that the June 10 petition of the Union did not give the Company sufficient time in which to act, and that neither Bodine nor Larson had authority to deal with the Union (R. 75–76). As to the latter point, the record shows that Larson was general superintendent of all respondent's operations, and was the largest stockholder and a director of the Company (R. 330). Larson admitted, moreover, that as general superintendent he had authority to meet and confer with the representatives of the employees, and thereafter to consult with respondent's Board of Directors as to the granting of any of the Union's demands (R. 331). There is not the slightest evidence that Larson ever consulted higher authority with respect to the Union's demands. On the contrary, the evidence points inescapably to the conclusion that respondent's labor relations rested entirely in the hands of Larson, respondent's general superintendent, director, and majority stockholder, and Bodine, the plant superintendent.

The contention that respondent lacked sufficient time in which to determine its position with respect to the Union's demands is likewise unconvincing. Conceding, *arguendo,* respondent's contention that the June 10 demands set an unreasonable limit of time in which the respondent might accept or reject them, it is clear that the argument does not justify the refusal to bargain after the strike was called.[9]

As we have seen, in addition to the June 10 petition in which the Union set forth specific requests and asked for a reply, the Union had requested negotiations in its communications of June 16 and 24 (*supra,* 27, 28). Respondent, however, although the size of the picket line (R. 232, 243, 287) was visible evidence that the Union represented a majority of the employees (cf. *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138, 142 (C. C. A. 9)), made no attempt to bargain collectively with the Union at any time. Instead, its

[9] The existence of the strike did not, of course, terminate the men's status as employees for purposes of the Act (Section 2 (3); *National Labor Relations Board* v. *Mackay Radio, etc., Co.*, 304 U. S. 333) or absolve the respondent of its duty to bargain collectively with the employees' representatives. *Black Diamond Steamship Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2), cert. den. 304 U. S. 579; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4), cert. den. 302 U. S. 731; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. den. 304 U. S. 575; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9).

general superintendent flatly proclaimed that it would prefer to close down entirely rather than have the Union in the plant (*supra,* p. 25).

Upon these facts the Board had no alternative except to find that respondent, on June 15, 1937, and thereafter, refused to bargain collectively with the Union in violation of Section 8 (5) of the Act (R. 98).

C. The lay-offs and the refusals to reinstate

The complaint, as amended, alleged that respondent had violated Section 8 (3) of the Act by discriminatorily discharging certain named employees prior to the strike and thereafter refusing reinstatement to them and to others of the strikers because of their union membership and activity (R. 6–7). The Board found that the discharges or lay-offs were not discriminations as to hire or tenure of employment in violation of Section 8 (3) (R. 78). It found, however, that the respondent had violated the Act by its refusal to reinstate certain of the strikers. The record fully supports this finding.

On June 25, the day on which the strike was terminated, the Union sent to the respondent a petition, requesting reinstatement in order of seniority of 118 named striking employees (R. 134, 146, Bd. Exh. 4, R. 137). Thirty-six employees, all but four of whom were named in the Union's petition for reinstatement (Bd. Exh. 4, R. 137–141) have not been reinstated by respondent, among them the 15

employees named in the complaint, as amended.[10] In addition to applying for reinstatement through the Union's petition, all but two [11] of the fifteen had applied in person to Bodine for reinstatement after the strike (R. 136, 173, 185, 206, 213–214, 234, 253, 264, 270, 275, 280, 303, 469).

Respondent contends that there was a decrease in the volume of its production in June, and that consequently it reduced its personnel (R. 79). Nevertheless, it appears that following the strike respondent added to its pay roll a substantial number of employees. On June 25, the day the strike ended, respondent had on its pay roll 66 employees (Resp. Exh. 1, R. 392); on June 30 there were 101 men employed by the Company (Resp. Exh. 9, R. 510); at the end of July there were 142 [12] (Resp. Exh. 9, R. 510); and by August 31, 153 employees were on respondent's pay roll (R. 350, 421, Resp. Exh. 9, R. 510). Bodine admitted that by September 1 the plant was carry-

---

[10] William Ashworth, Henry Boontjer, Frank German, Lawrence German, James Grier, Arthur Hannum, Edward Hannum, Lester Hazleton, Chester Lucas, Lawrence McNutt, Arnold Moss, Sylvester Osborne, Thomas Roddy, Glenn Stewart, and Gerald Wenker. It will be recalled that the complaint was dismissed on motion of the Board's attorney as to 11 additional employees who failed to appear at the hearing (*supra*, p. 3).

[11] The two employees who did not apply in person were Hazelton and Wenker.

[12] Bodine, testifying from records in his possession, stated that the number employed at the end of July was 146 rather than 142 (R. 349).

ing on practically the same operations as on June 1 (R. 422), and that respondent was employing in September only 12 or 13 fewer men than it had engaged in May, the peak month of the year (R. 350, 422, Resp. Exh. 9, R. 510). Furthermore, from June 25, the date on which the strikers applied for reinstatement, through August 31, the respondent hired 30 new employees (Resp. Exh. 1, R. 392).

It is apparent, therefore, that respondent could have reinstated by September 1 all but two of the 32 strikers who had applied for reinstatement. Nevertheless, respondent did not rehire a single one of the 32.

We shall now discuss individually the cases of the 15 strikers whom the Board found to have been discriminatorily refused reinstatement, and whom the respondent urges were denied reinstatement for cause. It is submitted that the evidence fully supports the Board's finding that the only "cause" for which these union members were penalized by respondent was their union affiliation and activity.

D. The discriminatory refusals to reinstate individually considered

Lawrence McNutt, William Ashworth, and *Henry Boontjer* were employed as kiln workers under Foreman Gantz (R. 150, 224–225, 204, 382). McNutt was secretary-treasurer of the Union (R. 120); in his official capacity he had signed all the

communications sent to the respondent by the Union (Bd. Exh. 2, R. 123; Bd. Exh. 3, R. 128; Bd. Exh. 4, R. 137) ; and he was one of the union representatives at the meeting held in the Regional Director's office on June 15 (R. 176–177). It was at this meeting that Larson pointed to McNutt and said that he would never come back to work in his plant under any circumstances (*supra,* p. 25, R. 133). His foreman admitted having seen him at the Union organizational meeting of June 1 and told him at the time of his lay-off that the quality of his work had nothing to do with his dismissal (R. 165, 384). When McNutt applied for reinstatement Bodine rejected his application and told him that "he would much rather I [McNutt] stayed completely off the property" (R. 136).

Ashworth and McNutt had been told by Gantz that they were "damn fools to join the C. I. O." and that "The mistake you fellows made from the start was joining up with any outside organization whatever" (R. 143–144, 229). Bodine subsequently told Ashworth when the latter applied personally for reinstatement that he had better "forget the Los Angeles Brick Company" (R. 234). Ashworth testified he understood this to mean that, as a result of his union membership and activities, it was useless to attempt to get further employment with the respondent (R. 235).

Boontjer's name was on the list which the Union sent to respondent the day the strike ended and he

also applied in person two or three weeks after the strike (R. 206, Bd. Exh. 4, R. 137). Although Bodine told him that respondent was not putting on any more men (R. 207–208) the record establishes plainly that new employees were engaged from June 25 through August 31 (Resp. Exh. 1, R. 392).

The work performed by these men required no special skill (R. 166) and no question as to their competency appears to have been raised during the period of their employment prior to the strike. Gantz, however, stated at the hearing that McNutt was "too light for the job" (R. 428). Bodine assigned a different reason for not reemploying McNutt, viz., that McNutt, apparently a college graduate, was qualified for a better job than those which were being offered to the new men (R. 412). He admitted, however, that he had made no attempt to find out from McNutt whether he would accept one of these jobs (R. 412). In the case of Ashworth, Bodine said that the new men were performing different work than that which Ashworth had done (R. 405), but admitted that Ashworth could have been assigned to one of these jobs if he had so requested (*id.*). Ashworth was one of those on whose behalf the Union had requested reinstatement (R. 138), and Bodine knew how to get in touch with Ashworth (R. 406); nevertheless, he made no attempt to communicate with him (R. 405). Boontjer, too, was allegedly not offered one of the

general labor jobs because respondent "didn't think he was qualified" (R. 413).

In view of the resumption of substantially normal operations by respondent on September 1, and the undoubted availability of jobs (*supra,* pp. 31–32, 34), the Board was fully justified in rejecting the unconvincing pretexts advanced by respondent for not restoring these men to their former jobs or offering them other positions.

Frank German and *James Grier* were employed as truck drivers by respondent (R. 272, 278). Both men had received raises in salary while employed by respondent (R. 274, 278). Both were union members and attended meetings of the Union (R. 273, 278–279). They were active on the picket line during the strike and testified that they were seen on the picket line by the foremen as the latter went to and from the plant (R. 275, 279).

Bodine testified that German was not reinstated because only general labor jobs were available and because he had the "impression" that German had left the vicinity (R. 417–418). There appears to be no sound reason, though, why German, who had worked as a general laborer for respondent as well as in the capacity of truck driver, could not have been offered one of the general labor jobs, admittedly available (R. 278).

Respondent's contention is that Grier was discharged prior to the strike on account of his inefficiency and that he was denied reinstatement for

the same reason (R. 377). This contention fails completely to square with the facts that Grier was exceeded in seniority by only one other driver in respondent's service (R. 273), and that Mills, respondent's pit foreman (R. 370), gave Grier a letter of recommendation at the time of his lay-off, stating that "I have at all times found him a reliable man" (Bd. Exh. 8, R. 380). Bodine, too, admitted that he had given Grier a letter of recommendation (R. 410–411). A new truck driver was employed by respondent after the termination of the strike, without any offer being made to Grier to restore him to his former job or to another position (R. 373).[13]

The Board correctly concluded that respondent's contentions as to its alleged reasons for not reinstating German and Grier were lacking in conviction.

Arnold Moss, Thomas Roddy, and *Sylvester Osborne* were employed as general laborers (R. 183, 210, 268). Osborne had attended the union meet-

---

[13] The Board, upon adequate evidence (see Bd. Exh. 8, R. 380) found that Grier was not *discharged* prior to the strike, but was merely laid off on account of a reduction in force (R. 83). It is not disputed that employees so laid off prior to the strike retained their status as employees. See *Matter of Kuehne Mfg. Co.*, 7 N. L. R. B. 304, 323; cf. *Nashville C. & St. L. Ry.* v. *Railway Employees Dept. of A. F. of L.*, 93 F. (2d) 340 (C. C. A. 6), holding that under the Railway Labor Act of 1934 (45 U. S. C., title 45, ch. 8) temporarily laid off or "furloughed" employees are eligible to participate in an election to determine collective bargaining representatives.

ings on June 1 and 5, and Roddy and Moss were on the picket line (R. 187, 212–213, 269). Baer told Moss when he laid him off that he was a good worker and would be called again for employment (R. 268). A new man, however, was hired in Moss' place (R. 410). Bodine's only explanation of this action was that it was done "because of the nature of the job" (R. 410). Osborne, too, according to Superintendent Bodine, was not rehired "because of the nature of the work" (R. 417). The inadequacy of this explanation becomes apparent when it is observed that the available work, as Bodine admitted, consisted of manual labor (R. 417) and that both Osborne and Moss had worked as laborers for respondent (R. 183, 210). It also appears that at the time Osborne applied for reinstatement, Bodine told him that he had better look some place else for a job, adding, "You boys be careful what kind of paper you sign after this" (R. 186).[14]

Bodine first testified that Roddy was not reengaged because of inefficiency (R. 407). Later, the following colloquy occurred:

> Q. Did you give Mr. Roddy a letter of recommendation?
>
> A. [By Mr. Bodine.] I believe I did; yes, sir.

---

[14] Bodine's remark was reasonably interpreted by the Board as a reference to Osborne's signing of a union membership card and as coupling the refusal to reinstate with this union activity (R. 80–81).

Q. Did I understand you to testify just a minute ago that Mr. Roddy's work was not satisfactory?

A. Well, I was getting him mixed up with another man.

Q. Well, now, let us get this clear about Mr. Roddy. Was his work satisfactory or not satisfactory?

A. As far as I know, his work was satisfactory (R. 407).

Upon the evidence reviewed above, the Board was fully justified in rejecting the reasons assigned by the respondent for its failure to reinstate Moss, Osborne, and Roddy.

Lawrence German and *Chester Lucas* were mechanics on the general maintenance crew (R. 251, 257). They had both received several raises in wages while in the employ of the respondent (R. 251, 257–258). Lucas had participated in the drafting of the Union's collective-bargaining demands (R. 259), and was a member of the committee that had presented the demands to Bodine on June 10 (R. 260–262). Both men were active on the picket line (R. 252–263). These two men, who had participated prominently in all the union activities at the plant, are the only members of their crew who are not now in respondent's employ (R. 255). Although Bodine testified that no one had taken Lucas' place (R. 403), the record shows that one new employee (Baer) was hired and one employee (Hall) was transferred to work on the crew after

the strike (R. 254–255), Resp. Exh. 1, 292–395). Both Lucas and German had greater seniority than Hall (Resp. Exh. 1, 392–395). Bodine stated that he had the impression that German had gone back to the Dakotas (R. 417–418), but it does not appear that the superintendent ever investigated as to the whereabouts of German or attempted to communicate with him (R. 417–418). As a matter of fact, the record shows that German applied twice for reinstatement and was in the vicinity of the plant for a period of time sufficient to have afforded respondent ample opportunity to reinstate him (R. 253–254, 255–256).

Glenn Stewart had last worked for respondent as a leverman on the steam press (R. 467); he had received several pay raises during his period of employment with respondent (R. 467). Stewart was one of the union men who presented the June 10 petition to Bodine (R. 468). At the time Stewart applied for reinstatement Bodine, according to Stewart, "waved his hands" and said he (Stewart) had "got off on the wrong foot" (R. 469–470, 476–477). Respondent offered no explanation of its failure to reinstate Stewart.

Gerald Wenker worked for the respondent as a transfer man for 8 months prior to the strike (R. 318–319). There had been no complaints about his work and he had received several raises in wages (R. 319). Although Superintendent Bodine testified that Wenker was not reemployed because

his job "had not yet become a steady one" (R. 411), he admitted that Wenker had started in respondent's plant as a general laborer; that general laborers had been hired since the strike; and that Wenker had not been offered a job as general laborer (R. 411).

Edward Hannum was elected president of the Union on June 5, 1937 (R. 169). Two days later he was laid off by respondent (*id*). At the time his employment terminated Hannum was working on the "dry press" (R. 167). In addition to being president of the local, Hannum was in charge of the picket line during the strike and was one of the union representatives at the meeting in the Regional Director's office (R. 169, 171, 172). During his two years in respondent's employ he had received three raises in salary (R. 167), and Bodine had commended his work highly (R. 168). Bodine testified that Hannum's job, owing to decreased production, had not been filled (R. 413). The Board pointed out, however (R. 85), that there is considerable interchange of jobs and classifications at respondent's plant, and that the union president had worked at numerous jobs for respondent, including general labor (R. 167). Bodine conceded that Hannum was not offered a job as general laborer when he applied for work (R. 413).

Arthur Hannum was on the union delegation which took the Union's petition to the respondent on June 10 (R. 125). He was a burner on the tunnel kiln at the time of the strike but remained on

duty until relieved by Foreman Baer (R. 230).[15] Baer, who was qualified to tend the kiln, testified that when he took it over everything was in satisfactory condition and that he thanked Hannum for remaining and thus preventing damage (R. 455).

On June 25, the day on which the Union abandoned the strike, Hannum asked Bodine for reinstatement, a request which was refused on the ground that respondent was not going to start the tunnel kiln (R. 303). By the first week in August operation of the kiln had been resumed (R. 418). The superintendent testified that Hannum was not reemployed because he had heard that he had left the vicinity by August 7 (R. 418).[16] He added that, notwithstanding this fact, he had no intention of reinstating Hannum to his former position because Hannum had been found sleeping while on duty (R. 418–419). Respondent did not contend that Hannum's dereliction disqualified him for one of the available general labor jobs, a type of work which Hannum had previously done for respondent (R. 300).

It appears that Hannum fell asleep for only ten minutes and that no damage was occasioned

---

[15] It was on this occasion that Baer told Hannum that he thought if the men had either a company union or the A. F. of L., Larson would have talked business, but that Larson was opposed to the policies of the C. I. O. (R. 302, *supra*, p. 27).

[16] Hannum left the vicinity of respondent's plant on July 14 (R. 303–304).

thereby (R. 305, 307–308). Significantly, Hannum was neither discharged nor otherwise disciplined for the offense (R. 344). When queried as to why Hannum had not been penalized for his action, Larson testified that he had taken the matter up with Baer and that they were trying to find a man to take Hannum's place when the strike occurred (R. 344). Later, however, Larson testified that the reason Hannum was not discharged at the time of the incident was because the kiln was to be shut down in 15 or 18 days and the Company did not wish to break in a new burner for that length of time (R. 443–444). Baer, although called as a witness, did not testify regarding the discussions with Larson.

The inconsistency in Larson's statements, taken in conjunction with the Board's finding (R. 74–75) that the general superintendent was not a reliable witness, justified the Board in rejecting Larson's explanation of the failure to rehire Hannum, and in concluding that "respondent regarded Hannum's dereliction as minor; * * * the gravity now asserted for the incident is an afterthought" (R. 87).

Lester Hazleton had worked for respondent continuously since 1929 (R. 189–190). We have previously referred to Hazleton as the employee to whom Bodine suggested that he spread the word around that there would be no Christmas bonus if the Union came into the plant (*supra*, p. 20, R. 192). Hazleton's refusal to carry out Bodine's

instructions (R. 194) was calculated to incur the enmity of the superintendent and to proclaim Hazleton a union sympathizer. Bodine testified that he had not reinstated Hazleton because he understood that Hazleton had obtained another job and because he believed that it would be "humiliating" for Hazleton to work at a lower rate of pay than he had formerly received (R. 412). Bodine gave no explanation of why Hazleton's rate of pay would have been decreased. Further, there is no showing that Hazleton's former position was abolished or that his work was assigned to other employees after the strike. The contention that Hazleton was inefficient cannot be taken seriously, the record showing that for at least two years prior to the hearing there had not been the slightest complaint about Hazleton's work (R. 198). The Board justifiably found that "no credible reason has been advanced for not taking back Hazleton" (R. 86).

Respondent argues that the charge of discrimination against the 15 employees referred to above is rebutted by the fact that members of the Union other than these 15 were reinstated. It is a complete answer to this contention that respondent could not have avoided the necessity of restoring some of the union men unless it had been willing to replace three-fourths of its old, experienced employees with new, untried workers, thus endangering the successful operation of its plant. Moreover, it is obvious that the wholesale replacement of all union members would have made the fact

of discrimination nakedly apparent. Respondent's purpose, the discouragement of membership in the Union, was susceptible of accomplishment by less drastic means.

Equally unsound is the contention that respondent could not have been expected to assume the burden of soliciting employees to return to work. This argument ignores the fact that the Union had sent respondent a petition for reinstatement of its members and that there were in addition numerous individual applications by the men themselves. Respondent was well aware that the strikers were available for reemployment at the time it commenced the hiring of new employees (R. 403), and respondent's deliberate rejection of its old, experienced employees in favor of new men is explainable only as a penalty against those union members who were denied reinstatement and as a significant warning to those who were taken back.

In addition to the allegations with respect to the 15 employees dealt with above, the complaint alleged that the respondent had discriminated in regard to the hire and tenure of employment of *Gregorio Cordero* and *Sam Dabich* in refusing them reinstatement after their application on June 25. Cordero and Dabich were not reinstated until July 7 (Resp. Exh. 1, R. 394, 395).

Cordero's name was on the list submitted to respondent by the Union on June 25 (*supra,* p. 30). In addition, Cordero, who had been temporarily

laid off on June 3 (R. 216), applied personally to Bodine for reinstatement on or about July 1 (R. 217). Cordero testified that Bodine told him to return in a few days; that he did so return and that Bodine then told him he would not be reinstated because he (Bodine) had received reports that Cordero "was making a lot of trouble in the case of the Union" (R. 218). Cordero thereupon brought Bodine a letter to prove that he was not active in the strike but had been temporarily employed elsewhere (R. 218). Bodine reinstated Cordero the day following the production of the letter (R. 218).

The superintendent testified that the letter furnished by Cordero had nothing to do with his reinstatement and that the delay in reinstatement was caused by the fact that Bodine had learned that persons residing in the "company camp" had complained to the deputy sheriff about Cordero's loud talking (R. 420). Bodine admitted that he had never investigated the alleged complaints and there was no evidence introduced to show that complaints actually were made (R. 421).

In view of the fact that the alleged complaints about Cordero could have had no bearing upon his qualifications as a truck loader[17] (R. 215), and of the further fact that, in the words of the Board's

[17] *Vide* the fact that at the time Cordero was laid off Gantz gave him a letter of recommendation and told him that he would be very glad to put him back to work when business picked up (R. 216).

decision, there was "doubtful fortuity" in Bodine's sudden abandonment of his refusal to reinstate Cordero following production of proof that he did not actively participate in the strike, the Board was fully justified in rejecting Bodine's version of Cordero's reinstatement and concluding that the employee had faithfully described the circumstances surrounding his reengagement (R. 91).

Dabich had worked for the respondent for 11½ years (R. 312). When, on or about June 30, he applied to Bodine for reinstatement, the superintendent simply waved his hand, giving no explanation other than that there was "nothing doing" (R. 313). Subsequently, Dabich went to Larson and said, "Maybe we made a mistake. How's chances to go back to work?" (R. 317). Larson thereupon told him that he would be put on the next morning (R. 317). Dabich's testimony was not denied by Larson at any time in the course of the hearing. The "mistake" to which Dabich referred was the employees' union activity and efforts at self-organization and, as the Board found (R. 92), Larson unquestionably so understood. Although Bodine had general charge of all hiring and firing (R. 348), Larson did not hesitate to reverse Bodine's refusal to reinstate Dabich at once upon the latter's "repentance" for his association with the Union. On these facts, therefore, the Board correctly found that Dabich, like Cordero, was "initially denied reinstatement, and that [his] reinstatement was de-

layed, because [he] joined and assisted the Union" (R. 93).[18]

E. Recapitulation

The evidence, reviewed above, clearly supports the Board's finding that respondent, by numerous acts condemned by the statute, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act. Respondent's close scrutiny of the organizational efforts of its employees; the clear warnings against affiliating with outside organizations; the attempt to frighten prospective adherents away from a union by threatening to cancel the employees' bonus; the refusal to accord the Union the dignity of recognition or to treat with it as the collective-bargaining representative of respondent's employees; the deliberate denial of reinstatement to numerous union men, including the leaders of the Union, following the strike, despite the existence of available work;

---

[18] The Board stated that, "while the evidence does not show the specific jobs which were available for Cordero and Dabich when their reinstatement was first refused, we conclude, as in the cases of the 15 strikers named above, in the absence of a showing to the contrary, that they were qualified for positions which new employees were hired to fill between June 25, the date of the written application, and July 7, the date that Cordero and Dabich were reinstated." The Board's conclusion was well supported by the fact that both Cordero and Dabich were subsequently reinstated to jobs different from their former positions (R. 311, 314–315, 215, 221), "for no other reason than that the respondent became convinced that neither employee would menace its objective to defeat the Union" (R. 93).

and the remarkable willingness to reinstate employees who confessed their "error" in seeking to exercise their organizational rights, demonstrate convincingly respondent's profound hostility to the self-organization of its employees and its determination not to permit the Union to obtain a foothold in its plant.

Point III

The Board's order is wholly valid and proper under the act

A. The cease and desist provisions

Paragraph 1 (a), (b), and (c) of the Board's order (note 5, pp. 7–10, *supra*) commands desistance by respondent from the unfair labor practices in which it was found to have engaged, including its illegal refusal to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. Such cease and desist orders are mandatory under Section 10 (c) of the Act. (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265), and have uniformly been approved by the Supreme Court and by this and other Circuit Courts of Appeals. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.*, 91

F. (2d) 790 (C. C. A. 9), aff'd 303 U. S. 453; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9); *National Labor Relations Board* v. *Oregon Worsted Co.,* 96 F. (2d) 193 (C. C. A. 9); *National Labor Relations Board* v. *American Potash & Chemical Corp.,* 98 F. (2d) 488 (C. C. A. 9), cert. den., 306 U. S. 643; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9), cert. den., 304 U. S. 575; *National Labor Relations Board* v. *National Motor Bearing Co.,* decided 105 F. (2d) 652 (C. C. A. 9).

B. The affirmative provisions

The provisions of the order directing respondent to reinstate with back pay the employees found to have been discriminatorily refused reinstatement, with reimbursement for wages lost by reason of respondent's discrimination, and the placement upon a preferential list of those employees for whom employment is not immediately available, are authorized and appropriate means of effectuating the policies of the Act, which the Board, in the exercise of the discretionary power conferred by Section 10 (c), was fully warranted in requiring. Like orders have been sustained by the Courts in a multitude of cases. See, e. g., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348; *National Labor Relations Board* v. *Fainblatt,*

306 U. S. 601; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9), cert. den. 304 U. S. 575; *National Labor Relations Board* v. *American Potash & Chemical Corp.,* 98 F. (2d) 488 (C. C. A. 9), cert. den. 306 U. S. 643; *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652 (C. C. A. 9); *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862 (C. C. A. 2).

The similar order of reinstatement to the strikers who were the victims of respondent's unlawful refusal to bargain collectively, with back pay from the date of respondent's refusal to reinstate them, upon application, following the issuance of the Board's order, is likewise proper. Such orders have been sustained in all the pertinent cases, including *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9); *National Labor Relations Board v. Oregon Worsted Co.,* 96 F. (2d) 193 (C. C. A. 9); and *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4), cert. den. 302 U. S. 731. Cf. *Black Diamond S. S. Corporation* v. *National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2), cert. den. 304 U. S. 579.

The order contains the usual provision for the posting of appropriate notices. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261; cases cited *supra.*

CONCLUSION

It is respectfully submitted that the National Labor Relations Act is validly applicable to respondent, that the Board's findings are supported by substantial evidence, and that a decree should issue affirming and enforcing said order in full as prayed in the petition.

CHARLES FAHY,
General Counsel.
ROBERT B. WATTS,
Associate General Counsel.
LAURENCE A. KNAPP,
Assistant General Counsel.
BERTRAM EDISES,
RAMEY DONOVAN,
Attorneys,
National Labor Relations Board.

OCTOBER 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 9231

United States
Circuit Court of Appeals
For the Ninth Circuit.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

FILED

AUG 5 - 1939

PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9231

United States

Circuit Court of Appeals

For the Ninth Circuit.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Answer and Cross Complaint 31

Reply to 36

Appeal:

Bond on 151

Designation of contents of record on (Circuit Court of Appeals) 163

Designation of contents of record on (District Court) 159

Notice of 151

Statement of Points on (Circuit Court of Appeals) 164

Statement of points on (District Court) 140

Bond on appeal 151

Certificate of Clerk 160

Complaint 2

Answer to 31

Conclusions of Law 145

Cross Complaint 31

Reply to 36

Decree 146

Index Page

Designation of contents of record on appeal (Circuit Court of Appeals) 163

Designation of contents of record on appeal (District Court) 159

Findings of Fact and Conclusions of Law 143

Motion for Consolidation for purposes of appeal 154

Motion for extension of time for filing record 156

Motion for Judgment notwithstanding the memorandum decision, etc. 147

Names and Addresses of Counsel 1

Narrative Statement (for detailed index see "Testimony") 39

Notice of Appeal 151

Order denying motion for new trial (entered order) 149

Order extending time for filing record on appeal (filed 5-15-39) 157

Order extending time for filing record on appeal (filed 6-27-39) 158

Order striking affirmative defense 34

Reply to Amended Answer and Cross Complaint 36

Statement of points (Appellants') (District Court) 140

Statement of points (Circuit Court of Appeals) 164

Stipulation of Facts 36

Index Page

Supersedeas and Cost Bond 151

Testimony 39

Exhibits for defendant:

1—Nine (9) checks 53

2—Order approving final report, etc. 76

Exhibits for plaintiffs:

1—Certificate of copyright registration ("Lovely Lady") 40

2—Certificate of copyright registration ("Would You") 41

3—Certificate of copyright registration ("When Did You Leave Heaven") 42

4—Certificate of copyright registration ("It's D'Lovely") 44

5—Certificate of copyright registration ("When a Lady Meets a Gentleman Down South") 45

6—Schedule of songs noting time played, dated 11-30-36 47

7—Letter from A. S. O. C. A. & P. to Trianon Ballroom dated May 27, 1935 71

8—Letter from Herman D. Kenin to Trianon Ballroom dated Dec. 1, 1936 88

9—Letter from John Savage to Herman Kenin, dated Dec. 7, 1936 64

Index Page

Exhibits for plaintiffs (con't):

10—Letter from Herman D. Kenin to John Savage, dated Dec. 8, 1936 65

11—Letter from Herman D. Kenin to John Savage, dated Dec. 22, 1936 92

12—Letter from Herman D. Kenin to John Savage, dated Dec. 15, 1936 93

13—Letter from John Savage to Herman D. Kenin, dated Dec. 28, ... 67

14—Letter from Herman D. Kenin to John Savage, dated Jan. 4, 1937 68

15—Decree, filed June 8, 1936 (Superior Court) 80

16—Memorandum of agreement, dated July 5, 1927........ 85

17—Letter from Herman D. Kenin to Lockhart Inn, dated Dec. 14, 1936 98

18—Index information card with P. O. registered card attached thereto...... 103

19—Memorandum of agreement, dated March 8, 1935........ 105

20—Index information card with P. O. registered card attached thereto...... 109

21—Notice in re license to publicly perform 115

22—Letter from Herman D. Kenin to Lyon's Music Hall, dated Dec. 5, 1936 121

Index Page

Exhibits for plaintiffs (con't):

23—Letter from Herman D. Kenin to Lyon's Music Hall, dated January 12, 1937 124

Witnesses for defendant:

Belknap, Clark
—direct 129

Haughland, Herbert W.
—direct 73

Kenin, Herman D.
—direct 127
—cross 128

Lockhart, John G.
—direct 96
—cross 96

Ross, Bert C.
—direct 133
—cross 133
—redirect 137
—recross 138

Savage, John E.
—direct 52
—cross 61
—redirect 72
—recalled, direct 128
—cross 129

Index Page

Witnesses for plaintiffs:

Kenin, Herman D.

—direct 87

—recalled, direct 97

—cross 101

—redirect 101

—recalled, direct 104

—cross 110

—recalled, direct 127

Meriwether, Maurice

—direct 50

—recalled, direct 104

—recalled, direct 110

—recalled, direct 120

Stanley, John L. (Deposition)

—direct 111

—cross 113

Wright, Eliot

—direct 46

NAMES AND ADDRESSES OF COUNSEL

SWEENEY & HAUGLAND,
H. W. HAUGLAND,
905 Arctic Bldg.,
Seattle, Washington,
and
HERMAN D. KENIN,
1412 Public Service Bldg.,
Portland, Oregon,
Attorneys for Appellants.

CLARK R. BELKNAP,
% Law Library,
County-City Bldg.,
Seattle, Washington,
Attorney for Appellee. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States District Court
Northern Division, Western District of Washington

No. 1162
In Equity

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Plaintiffs,

vs.

TRIANON COMPANY, INC., a corporation,

Defendant.

BILL OF COMPLAINT

The complaint of the plaintiffs alleges the following facts, common and applicable to each separate count of the bill of complaint, to-wit:

1. That the plaintiff, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the "Society"), at all times hereinafter mentioned, was and still is an unincorporated association duly organized and existing under and by virtue of the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. That the membership of the Society exceeds 700, and is comprised of authors, composers

and publishers of musical works; that said Society was organized and is now operating for the purpose of protecting the performing rights in musical works, copyrighted by said members respectively, against infringement because of the public performance thereof for profit.

2. That Gene Buck is President of said Society; that because said membership, as is above indicated, is exceedingly numerous and it would be impractical to join all the members of said Society as parties plaintiff, and the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by [2] said plaintiff, Gene Buck as President of the American Society of Composers, Authors and Publishers, for and on behalf of said Society.

3. That each of the plaintiffs described as a corporation, in the caption hereof, was and still is a corporation, duly organized and existing under the laws of the State of New York; and all of said corporations were and still are engaged in the business of printing, publishing and vending of copyrighted musical works.

4. That the defendant at all the times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the State of Washington.

5. Upon information and belief, that at all the times hereinafter mentioned, the defendant owned, controlled, managed and operated, and still owns, manages, controls and operates a certain place of business, for public entertainment, accommodation, amusement and/or refreshment, known as Trianon Ballroom, located at 218 Wall Street, in the City of Seattle, within King County, in the State of Washington, in this District. That in connection with the operation of such place of business and as part of the entertainment given thereat, and for the purpose of attracting trade and custom thereto, musical compositions were and are publicly played and performed, for profit, for the entertainment and amusement of patrons attending such place, and to make said place of business an attractive place for the patronage of the general public.

6. That the several corporate plaintiffs named in the caption hereof, jointly with American Society of Composers, Authors and Publishers, have causes of action against the defendant, which are properly joined in one action. That each cause of action asserted against the defendant is based on infringement by the defendant because of the public performance for profit and for purposes of profit of the several musical compositions, copyrights of which are owned by some one of the plaintiffs herein; that each of the corporate plaintiffs, for a valuable consideration, has heretofore duly assigned, transferred and set over to the Society the exclusive non-dramatic public performing rights in and to

any and all musical compositions then owned or thereafter acquired and copyrighted by the corporate plaintiffs respectively, [3] including the compositions hereinafter specifically set forth, for a term beginning January 1, 1936, and ending January 1, 1941.

7. That the Society is the sole and exclusive owner of the non-dramatic public performing rights in and to each and all of the copyrighted musical compositions hereinafter mentioned; that said Society, as assignee of said performing rights aforesaid, is solely entitled to the damages, costs and attorney's fees prayed for herein; that all of the corporate plaintiffs are members of said Society and as members thereof, and in their own right, as the respective owners of the copyrights hereinafter mentioned, with said Society, are jointly and severally interested in the several injunctions against the defendant, prayed for herein; that each of the infringements of the copyrights, by defendant, hereinafter complained of, occurred in, and in connection with the operation of, defendant's place of business aforesaid; that all of the actions joined in this bill are governed by the same legal rules and involve similar facts, and there is a community of interest among the plaintiffs in the questions at issue and the remedies sought; that the convenient administration of justice will be promoted by such joinder, and a multiplicity of separate actions against the defendant, arising on similar states of fact, will be avoided.

First Count

8. For first cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 preceding the first count, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

9. That prior to the 9th day of December, 1935, Ted Koehler, a citizen of the United States, originated, devised, created, and wrote the words and lyrics of a new and original musical composition, and that also prior to the said date, Jimmy McHugh, a citizen of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "Lovely Lady". [4]

10. That prior to the 9th day of December, 1935, the said author and composer assigned such composition to Robbins Music Corporation, (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

11. That thereafter and on the 9th day of December, 1935, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXV, By Robbins Music Corporation, New York, New York".

12. That after publication of such composition with such notices of copyright, the said Publisher

promptly, on the 10th day of December, 1935, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 52007; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit A", and by this reference made a part hereof.

13. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

14. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in this count, and all the rights secured under such copyright, except as to the rights assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in

trust for the Society, the exclu- [5] sive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

15. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher, and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and renditions for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances.

16. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

17. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

Second Count

18. For a second cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

19. That prior to the 9th day of April, 1936, Arthur Freed, a citizen of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition, and that also prior to the said date Nacio Herb Brown, a citizen of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "Would you". [6]

20. That prior to the 9th day of April, 1936, the said author and composer assigned such composition to Robbins Music Corporation, (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

21. That thereafter and on the 9th day of April, 1936, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Robbins Music Corporation, New York, New York."

22. That after publication of such composition with such notices of copyright, the said Publisher

promptly, on the 10th day of April, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 54613; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit B", and by this reference made a part hereof.

23. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

24. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 19 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assign-

ment the Publisher holds in trust for the Society, the [7] exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

25. Upon information and belief, that the defendant, on or about the 30th day of November, 1936, and at other times, prior and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher, and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances.

26. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

27. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

Third Count

28. For a third cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

29. That prior to the 7th day of July, 1936, Walter Bullock, a citizen of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "When Did You Leave Heaven".

30. That prior to the 7th day of July, 1936, the said author and composer assigned such compositions to Robbins Music Corporation (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

31. That thereafter and on the 7th day of July, 1936, the Publisher [8] duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Robbins Music Corporation, New York, New York".

32. That after publication of such composition with such notices of copyright, the said Publisher promptly, on the 8th day of July, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by

a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 56245; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit C", and by this reference made a part hereof.

33. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

34. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 29 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in trust for the Society, the exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

35. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to [9] continue such infringing performances.

36. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

37. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

Fourth Count

38. For a fourth cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake

of brevity, such allegations are not repeated but are adopted by reference.

39. That prior to the 30th day of September, 1936, Cole Porter, a citizen of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition, and that also prior to the said date Cole Porter, a citizen of the United States, composed, and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "It's D'Lovely".

40. That prior to the 30th day of September, 1936, the said author and composer assigned such composition to Chappell & Co., Inc., (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

41. That thereafter and on the 30th day of September, 1936, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Chappell & Co., [10] Inc., New York, New York."

42. That after publication of such composition with such notices of copyright, the said Publisher promptly, on the 2nd day of October, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied

by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 57754; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit D", and by this reference made a part hereof.

44. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 39 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in trust for the Society, the exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

45. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher, and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave

public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances.

46. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits [11] and income from such infringing performances.

47. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

Fifth Count

48. For a fifth cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

49. That prior to the 24th day of July, 1936, Dave Oppenheim, Michael H. Cleary and Jacques Krakeur, II, citizens of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition,

and that also prior to the said date Dave Oppenheim, Michael H. Cleary and Jacques Krakeur, II, citizens of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "When a Lady Meets a Gentleman Down South".

50. That prior to the 24th day of July, 1936, the said authors and composers assigned such composition to Popular Melodies, Inc. (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

51. That thereafter and on the 24th day of July, 1936, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Popular Melodies, Inc., New York, New York." [12]

52. That after publication of such composition with such notices of copyright, the said Publisher promptly, on the 28th day of July, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registra-

tion therefor as Class E., Pub. No. 56599; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit E", and by this reference made a part hereof.

53. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

54. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 49 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in trust for the Society, the exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

55. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher,

and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances. [13]

56. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

57. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

Wherefore, plaintiffs pray

(1) That this Court direct the defendant to answer this Bill of Complaint;

(2) That upon the filing and presentation of this Bill of Complaint, and of additional proof by Affidavits, an Order to show cause be issued forthwith, directed to said defendant, returnable at such

time and place as may be fixed by the Court, requiring said defendant to show cause, if any it had, why a preliminary injunction should not issue pendente lite, and that upon such hearing to show cause, the said defendant and all persons acting under the direction, control, permission or license of the defendant be enjoined and restrained from publicly performing each and every one of the musical compositions hereinbefore enumerated, and from causing or permitting the said compositions to be publicly performed in the defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise, and ordering that pending the said hearing to show cause and the determination thereof, and the entry of an Order thereon, the defendant and all persons acting under the direction, control, permission, or license of the defendant, be enjoined and restrained from publicly performing each and every one of the musical compositions hereinbefore enumerated, and from causing or permitting the said compositions to be publicly performed in the defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise, and ordering that pending the said hearing to show cause and the determination thereof, and the entry of an Order thereon, the defendant and all persons acting under the direction, control,

permission, or license of the defendant, be enjoined and restrained from publicly performing each and every one of the musical compositions hereinbefore enumerated, and from causing or permitting the said compositions to be performed in the [14] defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise;

(3) That upon final hearing a perpetual injunction be granted enjoining and restraining defendant and all persons acting under the direction, control, permission or license of the defendant from publicly performing each and every one of the hereinbefore enumerated compositions, and from causing or permitting the said compositions to be publicly performed in the defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise;

(4) That the defendant be decreed to pay such damages as may have been sustained by plaintiffs in consequence of defendant's said unlawful acts, but in no event not less than Two Hundred Fifty and No/100 ($250.00) Dollars apiece on each count herein;

(5) That the defendant be decreed to pay the costs of this action, and that a reasonable attorneys' fee be allowed; and

(6) For such other and further relief as to the Court may seem just and equitable in the premises.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers,
By HERMAN D. KENIN
Attorney
ROBBINS MUSIC CORPORATION
By HERMAN D. KENIN
Attorney
CHAPPELL & CO. INC.
By HERMAN D. KENIN
Attorney
POPULAR MELODIES, INC.
By HERMAN D. KENIN
Attorney
H. W. HAUGLAND
HERMAN D. KENIN
CLIFFORD S. O'BRIEN
Solicitors for Plaintiffs
Office and Post Office Address:
903 Artic Building
Seattle, Washington [15]

City, County and State of New York.—ss.

Gene Buck, being duly sworn, deposes and says that he is the President of the American Society of Composers, Authors and Publishers, one of the plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof,

and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is an unincorporated association, and deponent an officer thereof, to wit: its President.

GENE BUCK

Sworn to before me this 21st day of December, 1936.

[Seal] GERTRUDE W. PEARL

Notary Public, Kings County Clerk's No. 122. N. Y. County Clerk's No. 320.

Commission expires March 30, 1938.

City, County and State of New York—ss.

J. J. Bregman being duly sworn, deposes and says, that he is the Sec'y of Robbins Music Corporation, one of the plaintiffs herein, that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is a domestic corpora-

tion and deponent an officer thereof, to wit: its Secy.

J. J. BREGMAN

Sworn to before me this 21 day of December, 1936.

[Seal] GERTRUDE W. PEARL

Notary Public, Kings County Clerk's No. 122. N. Y. County Clerk's No. 320.

Commission expires March 30, 1938. [16]

City, County & State of New York—ss.

Henry M. Spitzer being duly sworn, deposes and says, that he is the President of Chappell & Co. Inc. one of the plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is a domestic corporation and deponent an officer thereof, to wit: its President.

HENRY M. SPITZER

Sworn to before me this 30 day of December, 1936.

[Seal] E. J. BRECHLIN

Notary Public, N. Y. Co. Clks. No. 1012, Reg. No. 83594. Queen County Clerk's No. 2487.

Commission expires March 30, 1938.

City, County & State of New York—ss.

Norman Collyer being duly sworn, deposes and says that he is the Secretary of Popular Melodies, Inc., one of the plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is a domestic corporation and deponent an officer thereof, to-wit: its Secretary.

NORMAN COLLYER.

Sworn to before me this 6th day of January, 1937.

[Seal] ANNA D. GHERSAN

Notary Public, Queens County. Queens County Clerk's No. 534, Queen County Register's No. 4232. Certified in New York County. New York County Clerk's No. 125. New York County Register's No. 7G64.

Commission expires Mar. 30, 1937. [17]

EXHIBIT A

Copyright office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts re-

specting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, New York.

Title of Music: "Lovely Lady"

Words and music by Ted Koehler and Jimmy McHugh of the United States.

Date of publication December 9, 1935. Copies received December 10, 1935.

Entry: Class E., Pub., No. 52007

Signed

[Seal] WILLIAM L. BROWN

Acting Register of Copyrights. [18]

EXHIBIT B

Copyright office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that

Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, N. Y.

Title of Music: "Would You"

Words and music by Arthur Freed and Nacio Herb Brown of the United States.

Date of publication Apr. 9, 1936. Copies received Apr. 10, 1936.

Entry: Class E., Pub., No. 54613

Signed

[Seal] WILLIAM L. BROWN

Acting Register of Copyrights [19]

EXHIBIT C

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of

a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corp., New York, N. Y.

Title of Music: "When Did You Leave Heaven"

Words and music by Walter Bullock and Richard A. Whiting of the United States.

Date of publication July 7, 1936. Copies received July 8, 1936.

Entry: Class E., Pub., No. 56245

Signed

[Seal] WILLIAM L. BROWN

Acting Register of Copyrights [20]

EXHIBIT D

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition

has been duly made in the name of Chappell & Co., Inc. New York, N. Y.

Title of Music: "It's D'Lovely"

Words and music by Cole Porter of the United States.

Date of publication Sept. 30, 1936. Copies received Oct. 2, 1936.

Entry: Class E., Pub., No. 57754

Signed

[Seal] WILLIAM L. BROWN

Acting Register of Copyrights. [21]

EXHIBIT E

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION.

This Is to Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Popular Melodies, Inc., New York, N. Y.

Title of Music: "When a Lady Meets a Gentleman Down South".

Words and music by Dave Oppenheim, Michael

H. Cleary and Jacques Krakeur II of the United States.

Date of publication, July 24, 1936. Copies received July 28, 1936.

Entry: Class E., Pub. No. 56599

Signed

[Seal] WILLIAM L. BROWN,

Acting Register of Copyrights.

[Endorsed]: Filed Jan. 16, 1937. [22]

[Title of District Court and Cause.]

AMENDED ANSWERS AND CROSS COMPLAINT

Comes now the Defendant and by leave of the Court first had and obtained files herein its amended answers and amended cross complaint and therein admits, denies and alleges as follows:

I.

Answering Paragraph I, Defendant admits that the American Society of Composers, Authors and Publishers (hereinafter for brevity's sake referred to as the "Society") is an unincorporated Association of over 700 members, and is comprised of Composers, Authors and Publishers of Music, with its principal place of business in the City of New York, State of New York, and deny each and every other allegation in said paragraph.

II.

Answering Paragraph II, defendant admits that the issues and questions involved are of common interest to all members of said Society, and deny each and every allegation contained in said paragraph.

III.

Answering Paragraph III, defendant admits that each of the plaintiffs described as a corporation, are engaged in the business of printing, publishing and vending of copyrighted musical works, but deny each and every other allegation in said paragraph. [23]

IV.

Answering Paragraph IV, defendant admits the allegations in said paragraph.

V.

Answering Paragraph V, defendant admits the allegation therein contained.

VI.

Answering Paragraph VI, defendant admits all of said paragraph save and excepting that defendant denies that the plaintiffs herein have causes of action against the defendant.

VII.

Answering Paragraph VII, defendant admits that the Society is the sole and exclusive owner of the dramatic public performing rights in and to each

and all of the copyrighted musical compositions mentioned in the plaintiff's complaint, and that each of the corporate plaintiffs are members of the Society, but deny each and every other allegation in said paragraph.

VIII.

Answering the First to Fifth counts inclusive, defendant admits that the Society is owner of the public performing rights of the musical compositions mentioned in said counts, and defendant alleges that he has no knowledge as to whether the various musical compositions were rendered in the defendant's place of business on the dates mentioned, or at all, and therefore deny that said musical compositions were unlawfully rendered, and defendant denies each and every other allegation in said counts, one to five, inclusive.

And for a Further and Separate Answer and Defense, and by way of cross-complaint, against the plaintiffs, defendant complains and alleges as follows:

XXXVIII.

That on the 1st day of July, 1927, the defendants, acting [24] under duress, business compulsion and in fear of being forced out of business, executed a contract with plaintiff Society, wherein and whereby the society granted the defendant the right to publicly perform all musical compositions controlled by plaintiffs; that said contract has never been canceled and is now in effect; that at the time of entering into said contract this defendant knew that plaintiff

society was a rich and powerful combine acting in violation of the Anti-Trust laws of the United States and of the State of Washington; and the defendant entered into said contract only because defendant was coerced into so doing by threats of costly litigation which defendant could not afford even though defendant should successfully defend suits brought by said society, and because it was less expensive to pay tribute to the unlawful combine (said society) than to fight numerous law suits.

[Endorsed]: Filed Mar. 30, 1937. [25]

[Title of District Court and Cause.]

ORDER STRIKING AFFIRMATIVE DEFENSE

This matter coming regularly before the court upon the motion of the plaintiffs to strike from the answer on file herein all of the separate answer and cross-complaint, excepting Paragraph XXXVIII thereof, and the matter having been set before the court for argument, and the plaintiffs having appeared by H. W. Haugland, of counsel, and the defendant having appeared by Messrs. Pomeroy, Belknap and Heiman, of its counsel, and argument having been had, and the matter being taken under advisement, and briefs having been filed by both sides, and the court having fully considered the matter and being fully advised in the facts and premises, and having heretofore, to-wit, on January 19,

1938, filed his Memorandum Opinion, and it regularly appearing that due notice has been given of the presentation of the within order, and it appearing to the court that all of the matters appearing in the said affirmative defense contained in the answer on file herein are not well pleaded for the reason and on the grounds that the matters therein contained are insufficient to constitute a defense or to constitute any defensive matter in a suit for infringement, now, therefore, it [26] is here and now

Ordered, Adjudged and Decreed that all of the separate answer and cross-complaint, being Paragraphs I to LXXIII, excepting Paragraph XXXVIII, be, and the same is hereby, stricken, to which order the defendant excepts and its exception is hereby allowed.

Done in Open Court this 25th day of January, 1938.

JOHN C. BOWEN,
Judge.

Presented by:
B. H. CAMPERSON,
Of Counsel for Plaintiffs.

Approved as to form:
CLARK R. BELKNAP,
Atty. for Def.
HAMMER & POMEROY,
Attys. for Def.

O.k. as to form:
JEFFREY HEIMAN.

[Endorsed]: Filed Jan. 25, 1938. [27]

[Title of District Court and Cause.]

REPLY.

Comes now the Plaintiffs and replying to Amended Answer and Cross-Complaint on file herein, denies and alleges:

I.

Replying to Paragraph XXXVIII of the Cross-Complaint Plaintiffs deny each and every allegation therein contained and the whole thereof.

Wherefore, having fully replied, Plaintiffs pray for judgment as in the prayer of their complaint contained.

H. W. HAUGLAND

Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 14, 1938. [28]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the above entitled cause may be submitted upon the following agreed facts, provided, however, that each of the parties expressly reserves the right to introduce evidence relating to the allegations that defendant gave the performances of the musical compositions described in the complaint herein:

1. The above named defendant owned, controlled, managed and operated, and still owns, con-

trols, manages and operates a certain place of business for public entertainment, accommodation, and amusement, known as Trianon Ballroom, located at 218 Wall Street, Seattle, Washington, in this District.

2. The parties hereto expressly refer to the Stipulation of Facts entered in Equity Cause No. 1170, being the case brought by Gene Buck, et alles, against W. L. Scribner, defendant, in the United States District Court, Western District of Washington, Northern Division, and hereby ratify and approve the Stipulations [29] of Fact filed in the said cause number, and adopt the following paragraph numbers in their entirety as the proper stipulation of facts to be entered in this cause: 1, 2, 3, 5 and 6; and further and expressly stipulate that the exhibits referred to in Paragraph 7 are identical in form and are the same agreements entered into between the parties in the instant suit; and further expressly stipulate that with respect to the paragraphs numbered 8 to 43, inclusive, the same shall represent the form of the stipulation entered into between the parties hereto, excepting that the names of the songs and the names of the composers shall be as in the instant case.

3. It is further expressly stipulated between the parties that all of the facts pleaded in the First Count, being Paragraphs 8 to 14, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

4. It is further expressly stipulated between the parties that all of the facts pleaded in the Second Count, being Paragraphs 18 to 24, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

5. It is further expressly stipulated between the parties that all of the facts pleaded in the Third Count, being Paragraphs 28 to 34, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

6. It is further expressly stipulated between the parties that all of the facts pleaded in the Fourth Count, being Paragraphs 38 to 44, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered. [30]

7. It is further expressly stipulated between the parties that all of the facts pleaded in the Fifth Count, being Paragraphs 48 to 54, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

Dated at Seattle, Washington, this 3rd day of August, 1938.

H. W. HAUGLAND
Attorneys for Plaintiffs
CLARK R. BELKNAP
Attorneys for Defendants

[Endorsed]: Filed Oct. 14, 1938. [31]

[Title of District Court and Cause.]

NARRATIVE STATEMENT OF EVIDENCE
(Testimony)

Be It Remembered that the above entitled causes came on for trial on the merits in the Court Room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon on October 14th, 1938, before the Honorable Edward E. Cushman, United States District Judge, one of the judges of said Court.

Plaintiffs in all cases were represented by H. W. Haugland of Seattle, Washington, and Herman D. Kenin, of Portland, Oregon;

Defendants in all cases were represented by Clark R. Belknap of Seattle, Washington, one of the attorneys of record in such cases, and

The following proceedings were had:

The Court:

You are proceeding with the understanding that in all five cases the hearing today will be supplemented with depositions? A deposition taken of one witness by plaintiff in each of these cases, is that it?

Mr. Haugland:

In each of the three cases, yes. The Trianon case, No. 1162, the Lockhart case, No. 1171, and the Tarry Inn case, No. 1172. We will proceed with the Trianon case first, No. 1162. I am filing Plaintiffs' Reply to the Affirmative Allegation in the Amended Answer and a Stipulation of Fact. I would like to file these copies of the certificates of ownership, which counsel has stipulated belong to the plaintiffs.

Copy of certificate of Acting Register of Copyrights issued to Robbins Music Corp., New York City, covering music entitled "Lovely Lady" was then admitted in evidence, without objection, and marked "Plaintiffs' Exhibit #1."

PLAINTIFF'S EXHIBIT No. 1

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, New York.

—Copy—

Robbins Music Corp. New York, N. Y.
Title of Music: "Lovely Lady"

Lyric by Ted Koehler

Music by Jimmy McHugh of the United States

Date of publication December 9, 1935. Copies received December 10, 1935.

Entry: Class E., Pub., No. 52007.

[Seal] Signed WILLIAM L. BROWN
Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #1 Adm. [92]

Copy of certificate of Acting Register of Copyrights issued to Robbins Music Corp., New York City, covering music entitled "Would You", was then admitted [33] in evidence, without objection, and marked "Plaintiffs' Exhibit #2."

PLAINTIFF'S EXHIBIT No. 2

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, N. Y.

—Copy—

Robbins Music Corp. New York, N. Y.
Title of Music: "Would You"

Lyric by Arthur Freed and music by Nacio Herb Brown of the United States, from the picture San Francisco.

Date of publication Apr. 9, 1936. Copies received Apr. 10, 1936.

Entry: Class E., Pub., No. 54613.

[Seal] Signed WILLIAM L. BROWN
Acting Register of Copyrights.

[Endorsed]: Pltffs. Ex. #2 Adm. [93]

Copy of certificate of Acting Register of Copyrights issued to Robbins Music Corp., New York City, covering music entitled "When Did You Leave Heaven" was then admitted in evidence, without objection, and marked "Plaintiffs' Exhibit #3."

PLAINTIFF'S EXHIBIT No. 3

E1

—Copy—

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts re-

specting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corp., New York, N. Y.

Title of Music: When Did You Leave Heaven. From Sing Baby Sing. Lyric by Walter Bullock and music by Richard A. Whiting of the United States.

Date of publication July 7, 1936. Copies received July 8, 1936.

Entry: Class E., Pub., No. 56245.

[Seal] Signed WILLIAM L. BROWN
Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #3 Adm. [94]

Copy of certificate of Acting Register of Copyrights issued to Chappel & Co., Inc., New York, N. Y., covering music entitled "It's D'Lovely", was then admitted in evidence, without objection, and marked "Plaintiff's Exhibit #4."

PLAINTIFF'S EXHIBIT No. 4

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Chappell & Co., Inc., New York, N. Y.

—Copy—

Chappell & Co., Inc. New York, N. Y.
Title of Music: "It's D'Lovely"

Words and music by Cole Porter of the United States from Red Hot and Blue.

Date of publication Sept. 30, 1936. Copies received Oct. 2, 1936.

Entry: Class E., Pub., No. 57754.

[Seal] Signed WILLIAM L. BROWN
Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #4 Adm. [96]

Copy of certificate of Acting Register of Copyrights issued to Popular Melodies Inc., New York, N. Y., covering music entitled "When a Lady Meets a Gentleman Down South", was then admitted in evidence, and marked "Plaintiffs' Exhibit #5."

PLAINTIFF'S EXHIBIT No. 5

E1

—Copy—

Copyright Office of the United States of America
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composi-

tion has been duly made in the name of Popular Melodies Inc., New York, N. Y.

Title of Music: When a Lady Meets a Gentleman Down South. Words and music by Dave Oppenheim, Michael H. Cleary and Jacques Krakeur II of the United States.

Date of publication July 24, 1936. Copies received July 28, 1936.

Entry: Class E., Pub., No. 56599.

[Seal] Signed WILLIAM L. BROWN
Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #5 Adm. [97]

ELIOT WRIGHT

produced as a witness on behalf of Plaintiffs, after being duly sworn, was examined and testified as follows:

Direct Examination

I am a musician and have been for thirteen years. I studied music at the University of Oregon and prior to that was a professional trombone player. Since that I have been a professional pianist in various theatres and dance orchestras.

In November, 1936, I was employed by Mr. Kenin to visit various establishments that were using music played by orchestras and take down the names of the tunes they were playing. On November 30th, 1936, I visited the Trianon Ballroom in Seattle. I paid an admission fee of thirty-five cents

(Testimony of Eliot Wright.)

and found there about five hundred persons. There was an eleven piece orchestra playing during the time I was there. Plaintiffs' Exhibit #6 is a list I made of songs played while I was present in the Trianon Ballroom. They played all of the pieces listed there.

The document referred to, Report of the Trianon Ballroom, by Eliot Wright, was then admitted in evidence without objection, as Plaintiffs' Exhibit #6. [34]

PLAINTIFF'S EXHIBIT No. 6

Establishment: Trianon Ballroom.

Address—218 Wall Street.

City—Seattle, Washington.

Date—November 30, 1936.

Time Entered—11:37 P. M.

Proprietor ( )—John Savage.

Time Left—12:10 A. M.

Title of Song & How Rendered		Number of Verses & Choruses	Time Played
1. Title Lovely Lady		1 C.	11:41
How Rendered	Band		
2. Title When I grow too old to Dream		1 C.	11:44
How Rendered	Band		
3. Title Would You		2 C.	11:46
How Rendered	Band		
4. Title The Way you Look Tonight		1 C.	11:50
How Rendered	Band		
5. Title When did you Leave Heaven		1 C.	11:53
How Rendered			
Vocal by Margaret Sheaty (Armature)			

(Testimony of Eliot Wright.)

6.	Title This is a Fine Romance How Rendered Band	1 C.	11:54
7.	Title Star Dust How Rendered Trombone solo—band acc.	1 C.	11:55
8.	Title When a Lady Meets a Gentleman Down South How Rendered 2 band cho—1 vocal by Ruth Skinner	3 C.	11:57
9.	Title Alexanders Ragtime band How Rendered Band	3 C.	12:00
10.	Title It's Delightful, It's Delicious, It's De-Lovely	3 C.	12:03
11.	Title I'm in a dancing Mood How Rendered Band	3 C.	12:06
12.	Title.................................. How Rendered..................................	V. C.	——

Report Rendered by:

ELIOT WRIGHT
MAURICE MEVIWEATHER
Inspectors

Please report in ink. [99]

Of report is for Theatre, answer the following:

Seating capacity—

Admission—

1. Name of Picture
   Producer
   Titles of Songs
   How rendered
2. Name of Picture
   Producer
   Title of Songs
   How rendered

(Testimony of Eliot Wright.)

List all titles of songs played in Newsreels, trailors and advertisements. If newsreel, list producers of film and how tune was rendered. If trailor, advise picture it was announcing and how tunes were rendered. Also list tunes, if any, played on phonograph records before show and during intermission.

Additional Information on General Establishments:

Type of establishment (beer parlor, dance hall, nite club, etc.)

Dance Hall

Admission, minimum or couvert charge: 35¢ plus 10¢ checking Fee.

Capacity: About 1400 people.

Name of orchestra: Nick Stewarts Orchestra.

Number of nites per week operated with music: don't know.

Names of soloists (vocalists): Ruth Skinner, Ollie Perrillo (Bass Player).

List of instruments in orchestra: Three brass, three Sax, Piano, drums, bass, guitar & Pipe Organ.

Remarks: Band is a Traveling Band with exception of Trombonist Galen Gloyd, and Organist Tubby Clarke who are local men.

About 250 couples dancing—according to fellows in band this was a bad Monday night.

[Endorsed]: Pltfs. Ex.# 6 adm. [100]

(Testimony of Eliot Wright.)

Mr. Belknap:

If the Court please, just for shortening the record, the defendant will stipulate that in each of the respective instances involved in these suits, there was rendered the music alleged to have been rendered in their various complaints.

The Court: It will be so understood.

MAURICE MERIWETHER,

produced as a witness for the plaintiffs, was sworn and took the witness stand.

Mr. Belknap: His testimony will be the same and we will stipulate.

Mr. Haugland:

It is now our understanding that in each of the five cases it is stipulated by counsel that the numbers—musical selections alleged in our complaints were performed at the time and at the place alleged and that the institutions were places of public entertainment, and therefore they were public performances for profit of these numbers?

Mr. Belknap: Yes.

The Court: So understood.

Mr. Haugland: I am filing the stipulation of facts.

The Court:

These stipulations in each case admit the performance on the date alleged?

Mr. Belknap: Yes. [35]

Mr. Haugland:

In the Scribner case, being No. 1170, we prepared our original stipulation, to which we have attached the various exhibits referred to in that stipulation, and all other stipulations adopt and refer to these, although in addition to that they admit the allegations of certain paragraphs of the complaint. With that understanding, the plaintiff will rest in this case.

Mr. Belknap:

At this time the defendants in each of the five cases move to dismiss as to each and all of the corporate plaintiffs, because they allege in the complaints that the Society is the one that collects all costs and damages.

After argument, the Court ruled as follows:

The Court:

The motion is denied, with the reservation that when the court has had further opportunity to examine the pleadings the matter may be further heard or considered.

Mr. Belknap:

The defendants now move to dismiss as to the Society, for the reason that the only party who can maintain the suit is the owner of the entire copyright, and upon the additional ground that these suits and the Society's right to appear here are based upon an illegal contract.

The Court: Motion denied.

JOHN E. SAVAGE,

produced as a witness for the defendant, in cause No. 1162, was sworn and testified as follows:

Direct Examination

I am one of the managing officers of the Trianon Company, and have been since 1927, having had charge of its general management. [36]

In June or July, 1927, I took out a license with the American Society of Composers, Authors and Publishers for the Trianon. I have looked through my files, but am unable to locate the license. However, I remember we were to pay three hundred dollars a year under that license.

Mr. Haugland:

We object on the grounds that the license agreement will be the best evidence.

The Court:

Before ruling, you will be allowed to cross examine.

Mr. Savage (continuing):

Defendants Exhibit #1 is a series of checks, nine in number, which were given by the Trianon as payments on the license agreement testified to.

The checks in question (9) were then received in evidence without objection as "Defendant's Exhibit #1", each being in the amount of $75 and payable to the American Society of Composers, Authors and Publishers,

(Testimony of John E. Savage.)

and drawn on the account of the Trianon Company.

DEFENDANT'S EXHIBIT NO. 1

The National Bank of Commerce
of Seattle

Seattle, Washington, Oct. 23, 1934. No. 11627

Pay to the Order of Am. Society Composers Authors & Pub. $75.00 Seventy-five no/100 Dollars.

THE TRIANON CO.,
JOHN E. SAVAGE,

Pres.

TRA

(Endorsed on the back as follows)

Pay to the Order of the First National Bank, Portland, Oregon.

American Society of Composers, Authors and Publishers

Pay to the Order of Any Bank, Banker or Trust Co.

Prior Endorsements Guaranteed

The First National Bank

Oct. 29, 1934

Portland

24-4 Oregon 24-4

(Testimony of John E. Savage.)

19-3-12

The National Bank of Commerce
of Seattle

Seattle, Washington, Mch. 15, 1930. No. 5325

Pay to the Order of American Society Comp. Authors & Pub. $75.00

Seventy-five no/100 dollars

THE TRIANON CO.,
JOHN E. SAVAGE,
Pres.

(Endorsed on back as follows)

American Society of Composers, Authors and Publishers.

Clark R. Belknap

Pay First Seattle Dexter Horton National Bank
262 Seattle, Wash. or Order 262
Clark R. Belknap

Received Payment Through Clearing House Association of Seattle. (All Prior Endorsements Guaranteed).

Mar. 19, 1930

First Seattle Dexter Horton National Bank
19-2 of Seattle 19-2

[131]

(Testimony of John E. Savage.)

The National Bank of Commerce
of Seattle 19-3-12
Seattle, Washington, Dec. 26, 1929. No. 4932

Pay to the Order of Am Society Comp & Authors
$75.00.

Seventy-five no/100 dollars.

THE TRIANON CO.,
JOHN E. SAVAGE,
Pres.

(Endorsed on back as follows)

American Society of Composers, Authors and Publishers
Clark R. Belknap

Pay First Seattle Dexter Horton National Bank
262 Seattle, Wash. or Order 262
Clark R. Belknap

Received Payment Through Clearing House Association of Seattle. (All Prior Endorsements Guaranteed)

Dec. 30, 1929

First Seattle Dexter Horton National Bank
19-2 of Seattle 19-2

(Testimony of John E. Savage.)

19-20-12 No. 4155

The National City Bank of Seattle

Seattle, Washington, July 6, 1929

Pay to the order of American Society of Composers & Publishers $75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,
JOHN E. SAVAGE,

Pres.

(Endorsed on back as follows)

American Society of Composers, Authors and Publishers

Clark R. Belknap

Pay to the Dexter Horton Natl. Bank

2868 of Seattle or Order 2868

Clark R. Belknap

Received Payment Through Clearing House Ass'n of Seattle. All Prior Endorsements Guaranteed.

Jul. 10, 1929

The Dexter Horton Nat'l. Bank

19-4 of Seattle 19-4

Received Payment Through Clearing House Association of Seattle (All Prior Endorsements Established. D-H 1870.

Jul. 10, 1929

The Dexter Horton National Bank

19-4 of Seattle 19-4

[132]

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12
of Seattle
Seattle, Washington, Feb. 17, 1935. No. 12065

Pay to the Order of American Society of Composers & Publishers $75.00.

Seventy-five no/100 dollars
THE TRIANON CO.,
JOHN E. SAVAGE, Mgr.

(Endorsed on reverse side as follows)
American Society of Composers & Publishers

Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed.

The First National Bank
Feb. 20, 1935
24-4 Portland, 24-4
Oregon.

Pay to the Order of the First National Bank
Portland, Oregon.
American Society of Composers, Authors and Publishers.

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12
of Seattle

Seattle, Washington, June 20, 1935. No. 12528

Pay to the Order of Am. Society of Composers & Publishers $75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,
JOHN E. SAVAGE, Mgr.

(Endorsed on reverse side as follows)

American Society of Composers
Pay First National Bank
681 Metropolitan Branch 681
Seattle, Wash., or order
American Society of Composers,
Authors & Publishers

Pay to the Order of Any Bank or Banker or through Clearing House Association of Seattle. All Prior Endorsements Guaranteed.

19-21 Jun 22, 1935 19-21
Metropolitan Branch
First National Bank of Seattle
Seattle, Wash.
Successor to
Metropolitan National Bank [133]

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12
of Seattle

Seattle, Washington, Mch. 10, 1934. No. 10766

Pay to the Order of Am. Society Comp. Authors & Pub. $75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,
JOHN E. SAVAGE, Mgr.

(Endorsed on the reverse side as follows)

Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed.

The First National Bank
Mar. 10, 1934
24-4 Portland, 24-4
Oregon
T. T. Ashton, Cashier

[Endorsement Cancelled 24-4.]

Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed.

The First National Bank
Mar. 13, 1934
Portland,
24-4 Oregon 24-4

Placed to the Credit of Within Named Payee.
Endorsement Guaranteed
The First National Bank of Portland, Oregon

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12
of Seattle
Seattle, Washington, May 29, 1934. No. 11078

Pay to the Order of Am. Society Comp. & Publishers $75.00.

Seventy-five no/100 dollars
THE TRIANON CO.,
JAMES E. SAVAGE, Mgr.

(Endorsed on reverse side as follows)
Pay to the Order of the First National Bank
4191 Portland, Oregon. 4191
American Society of Authors and Publishers

Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed.

24-4 The First National Bank 24-4
May 31, 1934
T. T. Ashton, Cashier [134]

The National Bank of Commerce 19-3-12
of Seattle
Seattle, Washington, Aug. 2nd, 1934. No. 11297

Pay to the Order of American Society Composers, Publishers $75.00.

Seventy-five no/100 dollars
THE TRIANON CO.,
JOHN E. SAVAGE, Mgr.

(Testimony of John E. Savage.)

(Endorsed on reverse side as follows)

Pay to the Order of the First National Bank

4191 Portland, Oregon 4191

American Society of Authors and Publishers

Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed.

The First National Bank

Aug. 4, 1934

24-4 Portland, 24-4

Oregon

[Endorsed]: Defts. Ex. #1 adm. [135]

Cross Examination

About two weeks ago I looked through all our files for the license agreement. We have a filing system where we keep letters, invoices, receipts and everything of that kind.

We contend that we had a license that was in effect on November 30th, 1936. I don't know whether we made any payments to the society after June 20, 1935.

We have no correspondence file with the Society. I didn't look for any letters received from the Society, for I never saved letters. I save very few letters. I don't keep copies of the letters I write for I haven't a stenographer. I write most of my letters in longhand.

(Testimony of John E. Savage.)

I didn't claim on November 30, 1936, that I was operating [37] under a license because I have never been asked to make a claim.

I have had conversation with Mr. Kenin at different times. I discussed with Mr. Kenin the situation in the State of Washington at different times. During the time the State receivership was on they were not in the State, and after the decision in Olympia it looked very shady to me, and I discussed that with Mr. Kenin, and I discussed with him at that time that I thought if the company was to arrange a different set-up so they could do business in the State of Washington without being tied up on the monopoly charges they could do business. I was familiar with the broadcasting situation and the theaters and there was legislative matters coming up.

I didn't refuse to make any payments. He didn't ask me. I suggested that he get together and make rates for the State of Washington. I did not receive notice of cancellation of the license agreement.

I didn't keep any letters I received from Mr. Kenin. I think I had a couple of letters from him, but if I remember the contents of the letter I wrote him, it was along the line that I didn't think the company would be able to do business in the State of Washington under the present set-up.

I don't think I received any such letter (Plaintiffs' Exhibit #7). I knew Mr. Stanley personally and talked to him about these things a number of

(Testimony of John E. Savage.)

times. I told him I thought I should have an adjustment on that rate, and at no time was there ever any unfriendly relations or occasion for such letter.

Subsequently to July 1, 1935, I never made any payments to the Society. I knew that the State suit was dismissed in June of 1936.

I do not remember receiving a letter from the Society's representatives subsequent to July 1, 1935. I do not [38] know whether or not I received Plaintiffs' Exhibit #8, a letter dated December 1, 1936. I do remember I received a letter from Mr. Kenin. Plaintiffs' Exhibit #9 is written in my handwriting. After seeing that it refers to a letter of December 1, I will not say that I received Plaintiffs' Exhibit #8. Plaintiffs' Exhibit #9 is in my handwriting. I think I also wrote Mr. Kenin another letter. In my letter of December 7 I made no claim that I was operating under a license agreement. I said they should arrange a method of doing business in the state of Washington that was satisfactory. I think yet they will have to come to something of that kind before they can get along here. I remember getting the letter, Plaintiffs' Exhibit #10. I do not remember receiving Plaintiffs' Exhibit #12. There was nothing of importance in it anyhow. I might have received Plaintiffs' Exhibit #11, I can't say.

Plaintiffs' Exhibit #13 is in my handwriting. I received Plaintiffs' Exhibit #14. I did not fill out the application for a license contained in Plaintiffs' Exhibit #10 because I already had a license.

(Testimony of John E. Savage.)

Mr. Haugland:

I move the admission of all these exhibits, Plaintiffs' numbers 7, 8, 9, 10, 11, 12, 13, and 14.

Mr. Belknap:

We object to all copies. No notice was ever given to produce the originals.

The Court:

Nine, ten, thirteen and fourteen are admitted, and objection overruled.

Plaintiffs' Exhibit #9, original letter from John Savage to Herman Kenin dated Dec. 7, 1936, was then admitted in evidence. [39]

PLAINTIFFS' EXHIBIT NO. 9

Hotel Butler,
Seattle

Mr. Herman Kenin, Dec. 7th, 1936

Portland, Oregon,

Dear Friend Henry:

Your letter of December 1st received, and in reply will say that it was my impression that the "Society" was a monopoly and that the constitution of Washington is so strong against monopolies that it is not allowed to do business in the State.

I was in Portland about six weeks ago and would have given you a visit had I known where to find you. May be down again soon in case a matter I have in mind requires another personal visit. Do you come up this way? In case you do, would be glad to see you again.

(Testimony of John E. Savage.)

Suppose the violin has been stored away for good. With best personal regards and good wishes, I am

Yours sincerely,

JOHN SAVAGE.

[Endorsed]: Pltfs. Ex. #9. Adm. [106]

Plaintiffs' Exhibit #10, copy of letter from Herman D. Kenin to John Savage, dated Dec. 8, 1936, was then admitted in evidence.

PLAINTIFFS' EXHIBIT NO. 10

Mr. John Savage, December 8, 1936
c/o Trianon Ballroom,
Seattle, Washington.

Dear John:

I have your letter of December 7th in answer to my letter to you of December 1st. It had been my impression that all music users in the State of Washington had been informed of the decision handed down by the Judge in the suit which you mention. Evidently you have not received such notice. I am enclosing herewith for your information a copy of the decree.

I was in Seattle the other day, but only for a few hours. We are proceeding to organize our business in the State of Washington, and our field men are sending us the names of selections being performed in the various establishments.

(Testimony of John E. Savage.)

The Society feels that it is performing a service when it permits you, as a music user, to take a license making available a copyright pool of music. If it were not for the Society or someone acting on behalf of the copyright owners, you would have a difficult time trying to find each copyright owner and then making your separate terms with him for use of his selection, and at the same time hazarding the possibility of infringing upon someone's copyrights.

I would appreciate it, after reading the copy enclosed, if you will fill out the application contained herein so that we may have a record of your operation, and so that a rate may be quoted you by the Rate Committee of ASCAP.

My violins have been in mothballs for several years now, but I didn't put them away soon enough, although it was a lot of fun while it lasted.

Hoping to see you real soon, and with all good wishes, I am

Sincerely,

HERMAN D. KENIN.

enc. decree
kdk d

[Endorsed]: Pltfs. Ex. #10 adm. [107]

(Testimony of John E. Savage.)

Plaintiffs' Exhibit #13, original letter from John Savage to Herman Kenin, dated Dec. 28th, then received in evidence.

PLAINTIFFS' EXHIBIT NO. 13

Hotel Butler,
Seattle

Mr. Herman Kenin, Dec. 28th.
Portland, Oregon.

Dear Herman:

Should have written you sooner, but these holidays and other things caused me to postpone it.

In my investigations I have found a very much incensed ASCAP clientele. They figure the Attorney General's office and the receiver sold them out. That 7 or 8 thousand dollars in fees were involved besides a trip to Hollywood and possibly other emoluments, out of which the AG's office received $3,500.00 and possibly a share of the other. The decision of Wright was one asked for by the Atty. Gen's office and not his on the merits of the case. They still think the Washington constitution on monopolies is being violated and are figuring on an entirely new method of protecting themselves.

If the ASCAP concern wishes to do business in the State of Washington my opinion is they will have to take in their patrons in such a way as to overcome the "monopoly" angle.

For instance, ask a representative of the broadcasting stations, theaters, hotels and ballrooms to sit on a board with a representative of ASCAP for

(Testimony of John E. Savage.)
the purpose of fixing and agreeing upon the rates. This would take care of the "monopoly" side of the matter, and you would then be able to come into the State of Washington with clean hands and do business legitimately.

In the meantime, I do not believe it is the proper thing for me "to make an application" against their wishes.

Hope this finds you enjoying the Holiday Season and with best personal regards and good wishes, I am

Yours sincerely,
JOHN SAVAGE.

[Endorsed]: Pltfs. Ex. #13 adm. **[110]**

Plaintiffs' Exhibit #14, copy of letter from Herman D. Kenin to John Savage, dated January 4, 1937, was then received in evidence.

PLAINTIFFS' EXHIBIT NO. 14

Mr. John Savage, January 4, 1937
c/o Trianon Ballroom,
218 Wall Street,
Seattle, Washington.
Re: American Society License
Trianon Ballroom

Dear John:

I have your letter of December 28th. I can't understand how the music users of Washington can be incensed at ASCAP. Would you prefer to deal individually with the individual copyright owners

(Testimony of John E. Savage.)
of the selections played by your orchestras? Don't you think ASCAP is providing a service when they offer you a copyright pool?

You know as well as I do that the individual copyright owner cannot protect himself, and one of the reasons advanced for the dissolution of ASCAP by those resisting payment is so that the use of these valuable copyrighted properties may be made without compensating the copyright owner. The only way he can secure his rights as a practical proposition is by joining with others and protecting himself through an association.

ASCAP has never made it compulsory for anyone to secure a license from it. ASCAP has always been willing that users of music secure their licenses from individual copyright owners, but the plain truth is that none of them will do so. They insist upon their right to infringe. As it has been so aptly put, no one expects a thief, apprehended in the act of robbery, to speak well of the policeman who arrests him. We are the policemen in protecting the rights of our members, and we differ from the ordinary policemen in that no arrests are made until we have again and again cautioned the illegal operator to amend his ways.

You are infringing each night in your establishment. Evidence of this infringement is in our office. We have evidence of infringements running into hundreds of dollars in damages in the Trianon Ballroom, and I can assure you that when suit is brought against you in the Federal Courts of Wash-

(Testimony of John E. Savage.)

ington you will then discover that the property rights of our members will be protected under the United States Copyright Laws. [111]

The question of monopoly has been urged by those persons who wish to resist paying for the performance of these compositions on any basis. In other words, the claim is not against monopoly, but is a position taken to resist payment. You made the suggestion that the music users determine the fixing of rates. May I ask you how you would feel about having someone determine what you should get for property which belonged to you?

Now, let's be fair with one another. You know as well as I that the only purpose of the agitation which you speak is to keep from paying, and for no other reason.

I regret that it has become necessary for me to write this letter to you, but I am attempting to have you think of this thing clearly, and I hope that after receiving this letter you will reconsider this matter.

Very truly yours,

HERMAN D. KENIN.

[Endorsed]: Pltfs. Ex. #14 adm. [112]

(Testimony of John E. Savage.)

Mr. Belknap:

You served me with notice to produce this. (Indicating Exhibit #7)

The Court: Admitted.

Plaintiffs' Exhibit #7, copy of letter from Mr. Stanley to Trianon Ballroom, dated May 27, 1935, was then admitted in evidence.

PLAINTIFFS' EXHIBIT NO. 7

May 27, 1935

Trianon Ballroom, Registered Mail
Trianon Co., Inc.,
Seattle, Washington.

Gentlemen:

License to publicly perform music copyrighted by members of this Society in your establishment, the Trianon Ballroom, at the yearly rate of $300.00 expires July 1, 1935.

Pursuant to the terms of the contract, notice of cancellation thereof at the said expiration date is hereby given.

In explanation of this action permit us to say that under existing conditions it is no longer feasible for the members of this Society to continue in effect the rates which have heretofore prevailed covering license authorizing the public performance of their copyrighted musical works.

Assuming that you will desire to continue using in your programs after the above date of cancella-

(Testimony of John E. Savage.)

tion, music copyrighted by our members, we are enclosing form upon which please make application for license. Upon receipt of application, license at the new rate will then be forwarded for your consideration. The making of the application does not bind you to accept the license.

We avail ourselves of this opportunity to thank you sincerely for your cooperation heretofore given us which we do appreciate, and we hope that the friendly relationship may continue.

With all good wishes, we remain,

Sincerely yours,

AMERICAN SOCIETY OF
COMPOSERS, AUTHORS
AND PUBLISHERS,
JOHN L. STANLEY,
District Manager.

JLS:MA

Enc. 1

[Endorsed] Pltfs. Ex. #7 adm. [101]

Redirect Examination

Mr. Savage:

I have paid all statements the Society ever sent me, amounting to about twenty-four hundred dollars.

Mr. Haugland:

I think the testimony is improper.

The Court:

It may be that the Court will disregard the answer, but he may answer.

(Testimony of John E. Savage.)

Mr. Savage (continuing):

I am not certain whether any other dance halls paid fees as high as ours or not. At the Butler we paid $15 per month, at the Germania $10 per month.

HERBERT W. HAUGLAND,

called as a witness for the defendants, after being duly sworn, was examined and testified as follows: [40]

Direct Examination

I am a practising lawyer in Seattle and have represented the Society in certain matters for several years.

By sending notices of cancellation we recognized that licenses had previously been issued to some of the defendants.

I first knew that a temporary receiver had been appointed for the Society by reading about it in the newspaper, a temporary, general injunction was issued August 7, 1935, and the temporary receiver appointed 8-13-35 (C. R. B.) (H. W. H.)

Mr. Haugland:

In view of the turn which this case has taken I would like to ask the issuance of a subpoena duces tecum issued to the defendants so they will produce all of their records so we won't have any question

(Testimony of Herbert W. Haugland.)

about the copies. I apprehend that in each one of these three cases the same sort of contention will be made. Counsel says he wants some time to obtain further evidence. It is entirely agreeable to me that this case be continued to some day certain.

The Court: Is the motion resisted?

Mr. Belknap:

There are two motions. One for subpoena duces tecum for production of records or direction to the defendants to produce all their records and counsel has already admitted we have no records . . .

Mr. Haugland:

Coupled with a motion for continuance.

Mr. Belknap:

I will answer counsel's request. The two remaining defendants have absolutely no records of any kind. Regarding the notice of cancellation, there is none or any correspondence with the Society at all. The Tarry Inn and Lockhart Inn. They have absolutely no records whatever. [41]

Mr. Haugland: I am content then, and will not ask for a subpoena.

Mr. Belknap:

I will offer in evidence at this time a certified copy of an Order approving Final Report of Tracy E. Griffin as Receiver for the American Society of Composers, Authors and Publishers and all its affairs in this State.

(Testimony of Herbert W. Haugland.)

Mr. Haugland:

We have a copy showing he was finally discharged in June the next year. June, 1936. If counsel will stipulate this is a decree of dismissal in the case it may be introduced as an exhibit along with this, I have no objection.

Mr. Belknap:

I have no objection to this decree being introduced, but just to save labor of preparing it, won't you stipulate that Mr. Griffin was the receiver on the 21st day of August, 1935?

Mr. Haugland:

Sure. He was appointed as temporary receiver and we petitioned to remove the case to Federal Court and hearings were presented in the matter in Federal Court on a motion to remand. The motion to remand was granted. Then without any further notice to us a receiver was made permanent. Some time in February of 1936. He was discharged by the Court in Olympia in June, 1936.

The Court:

Both will be admitted, but neither of them have been identified by exhibit number. The copy of the decree and the copy of the order approving final report will be received in evidence.

Certified copy of order approving final report, etc., was then received in evidence and marked "Defendants' Exhibit #2".

(Testimony of Herbert W. Haugland.)

DEFENDANTS' EXHIBIT NO. 2

In the Superior Court of the State of Washington, for Thurston County.

No. 16114

STATE OF WASHINGTON ex rel, G. W. HAMILTON, Attorney General,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association, et al,

Defendants.

ORDER APPROVING FINAL REPORT, ETC.

Be It Remembered, this matter having come on to be heard before the undersigned Judge upon the final report of Tracy E. Griffin, as Receiver, filed herein, the defendant, American Society of Composers, Authors and Publishers, an unincorporated association, having appeared in this action and having approved said Final Report, and this Court having examined the same, taken evidence herein, and being advised in the premises,

It Is Ordered, Adjudged and Decreed that the Final Report of said receiver be and the same hereby is approved; and

It Is Ordered, Adjudged and Decreed that the non-action on the part of the receiver, during the period of time that ancillary proceedings in this

(Testimony of Herbert W. Haugland.)
cause were pending, either in the United States District Court or the Supreme Court of the State of Washington, be and the same hereby is approved; and

It Is Ordered, Adjudged and Decreed that the receiver has, at all times, faithfully performed his trust and the duties of his office throughout the term of this receivership; and

It Is Ordered, Adjudged and Decreed that the expenditures made by the receiver, aggregating the sum of $656.67, as shown by his Final Report, be and the same hereby are approved and said expenditure confirmed; and [136]

It Is Ordered that all prior accounts be and the same hereby are approved and disbursements ratified and confirmed; and

That the receiver be and he hereby is charged with the sum of $1,870.21, now on hand, of which sum $829.47 are the proceeds of collections, less deductions made by the receiver subsequent to December 31, 1935; and

It Is Ordered, Adjudged and Decreed that, considering the status of the entire matter and that except for the ancillary proceedings pending, either in the United States District Courts or in the Supreme Court of the State of Washington, the receiver might have collected from users of copyrighted music in the State of Washington substantial sums due pursuant contract agreements expiring December 31, 1935, and that said sums should be by the receiver collected or the accounts liquidated,

(Testimony of Herbert W. Haugland.)
there be and hereby is awarded to Tracy E. Griffin, as receiver, in full of his compensation as receiver, in addition to the allowance heretofore made, all cash on hand, together with all sums due, owing and unpaid from users of copyrighted music publicly performed in the State of Washington to the defendant American Society of Composers, Authors and Publishers, an unincorporated association, according to the terms of existing contracts with said defendant, up to and including December 31, 1935, only, and expiring on such date, excepting therefrom, however, any balances which may remain unpaid to said defendant from license holders who have been making payments directly to the said defendant during this receivership, and upon such award being herewith made, same shall become the property of said receiver, individually, and he may individually, take such action for the collection thereof as he may individually be advised; and

It Is Ordered, Adjudged and Decreed that the receiver shall, forthwith, surrender unto the defendant American Society of Composers, Authors and Publishers, an unincorporated association, all other assets in his possession, the property of said defendant, and that he shall execute and file in the office of the Register of Copyrights, Library of Congress, at Washington, D. C., such papers and documents as may be requisite in the premises to reassign [137] and re-transfer unto said defendant, and respective members thereof, all interest of any and every nature whatsoever he may have or claim in and to

(Testimony of Herbert W. Haugland.)
the ownership of any copyright of said defendant, and/or any member thereof, and, for that purpose, if additional time be required, that he may execute such documents, using the designation of "Receiver", even if he has previously been discharged.

It Is Ordered, Adjudged and Decreed that reasonable compensation for any counsel that might have been employed by the receiver during the course of this receivership would not have been less than $3,500.00, and, considering that the receiver was represented by E. P. Donnelly, Assistant Attorney General, the receiver be and he hereby is directed to pay, from out the proceeds and funds hereinabove awarded said receiver, such sum to said E. P. Donnelly as may be determined by said Donnelly and said receiver.

Done in Open Court this 8th day of June, 1936.

D. F. WRIGHT,

Judge.

State of Washington,
County of Thurston—ss.

I, (signature illegible), County Clerk and Clerk of the Superior Court of the State of Washington, for Thurston County, holding a session at Olympia, do hereby certify that the foregoing is a true and correct copy of the original as the same appears on file and of record in my office. In Witness Whereof,

(Testimony of Herbert W. Haugland.)
I have hereunto set my hand and affixed the seal of said Court this 5th day of March, 1937.

[Seal] (Sgd.) Signature Illegible,
Dep. County Clerk and Clerk of the Superior Court of Thurston County, State of Washington.

[Endorsed]: Dfts. Ex. #2 adm. [138]

Printed copy of Decree in cause No. 16114, Superior Court for the State of [42] Washington, Thurston County, dated June 8, 1936, was then admitted in evidence and marked "Plaintiffs' Exhibit #15."

PLAINTIFF'S EXHIBIT NO. 15

Copy by American Society of Composers, Authors and Publishers—Index 57

In the Superior Court of the State of Washington in and for Thurston County.

No. 16114

STATE OF WASHINGTON ex rel
G. W. HAMILTON, Attorney-General,
Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association, et al.,
Defendants.

DECREE

This matter coming regularly on before the court for a hearing upon the petition of the defendant,

(Testimony of Herbert W. Haugland.)

American Society of Composers, Authors and Publishers, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

It Is Now Therefore Ordered, Adjudged and Decreed as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"), a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and *such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a*

(Testimony of Herbert W. Haugland.)
*convenience and necessity to the users of music in obtaining the performing rights.**

3. *That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.*

4. *That the Society was formed for lawful purposes and that the plan being used by the American Society of Composers, Authors & Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors & Publishers,* an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and *as the same is being conducted, is approved as a working, feasible plan and is not* **violative of any of the laws of the State of Washington, or of the Constitution. [113]**

5. *That the Society serves a beneficial and useful and useful purpose as a clearing house through*

---

*Printer's Note: Italics, bold face and underscoring are the same as in the original.

(Testimony of Herbert W. Haugland.)
which users may obtain and clear performing rights in musical compositions.

6. The Receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid direct to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annulled, and any and all such assignments of copyright or rights in copyrights are hereby canceled and annulled, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry

(Testimony of Herbert W. Haugland.)

out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. *That the complaint herein be dismissed* **upon the merits.**

11. It is further Ordered, Adjudged and Decreed that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

Done in open court this 8th day of June, 1936.

[Signed] D. F. WRIGHT,

Judge.

State of Washington,
County of Thurston—ss.

I, Edwidge LaFond, Dep. County Clerk and Clerk of the Superior Court of the State of Washington, for Thurston County, holding session at Olympia, do hereby certify that the foregoing is a true and correct copy of the original as the same appears on file and of record in my office. In Wit-

(Testimony of Herbert W. Haugland.)

ness Whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of June, 1936.

[Seal] (Signed) EDWIDGE LaFOND,

Dep. County Clerk and Clerk of the Superior Court of Thurston County, State of Washington.

[Endorsed]: Filed Superior Court, Thurston Co., Wash., June 8, 3:01 P. M., 1936. Ellis C. Ayer, Clerk. By Edwidge LaFond, Deputy. [114]

[Endorsed]: Pltfs. Ex. #15 adm.

Mr. Haugland:

To save you the trouble of introducing any copies of the license agreement, I will produce the original copy of it. I am going to offer that in evidence.

Mr. Belknap: No objection.

Memorandum of agreement, dated July 5, 1927, between the American Society of Composers, Authors and Publishers and the Trianon Company, Inc., was then received in evidence and marked "Plaintiffs' Exhibit #16."

PLAINTIFF'S EXHIBIT NO. 16

Memorandum of Agreement between American Society of Composers, Authors and Publishers, 56 West 45th Street, New York, N. Y. (hereinafter styled "Society"), and Trianon Company, Inc. (hereinafter styled "Licensee"), as follows:

(Testimony of Herbert W. Haugland.)

1. Society grants and Licensee accepts for a period of one year commencing July 1, 1927, a license to publicly perform at Trianon Ballroom, Seattle, Washington, and not elsewhere, nondramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such nondramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited, unless consent of the Society in writing first be had.

3. Society reserves the right at any time to withdraw from its reportory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement, and receive pro rata refund of any unearned license fees.

4. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice

(Testimony of Herbert W. Haugland.)

in writing to the other of the desire to terminate the same at the conclusion of such year.

5. Upon any breach or default of any term or condition herein contained Society may upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

6. Licensee agrees to pay Society for the license herein the sum of Three Hundred Dollars ($300.00), payable at the rate of $75.00 on the first of each and every quarter.

In Witness Whereof, this agreement has been duly subscribed and sealed by Society and Licensee this 5th day of July, 1927.

[Seal] AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
By CLARK R. BELKNAP,
Agent and Attorney in Fact.
TRIANON COMPANY, INC.,
By JOHN E. SAVAGE.

[Endorsed]: Pltfs. Ex. #16 Adm. [115]

HERMAN D. KENIN,

produced as a witness for the plaintiffs, after being duly sworn, was examined and testified as follows:

Direct Examination

I am an attorney practising in Portland, Oregon, and have been acting as representative of the

(Testimony of Herman D. Kenin.)

American Society of Composers, Authors and Publishers.

I dictated these letters (Plaintiffs' Exhibits #8, 11, 12.) They were addressed to the Trianon Ballroom and are my office copies.

Mr. Haughland:

I move they be admitted as exhibits.

Mr. Belknap:

Copy of letter, dated Dec. 1, 1936, from Herman D. Kenin to Trianon Ballroom, was then received in evidence, and marked "Plaintiffs' Exhibit #8."

PLAINTIFF'S EXHIBIT NO. 8

Registered December 1, 1936.

Trianon Ballroom,
218 Wall Street,
Seattle, Washington.

Re: American Society License
Trianon Ballroom

Gentlemen:

Musical compositions copyrighted by our members, list of whom is herewith enclosed, were publicly performed without license at your establishment on November 30th, 1936. Among the selections performed were the following:

11:44 P.M. "When I Grow Too Old to Dream"
11:46 P.M. "Would You"
11:53 P.M. "When Did You Leave Heaven"

(Testimony of Herman D. Kenin.)

We have heretofore endeavored to maintain in the State of Washington, for the convenience of and service to users of music in public performances, a branch office of our Society and a staff of field representatives to serve such users of music and our licensees. However, local State officials have taken such steps as to nullify our desire to render such service, and in these circumstances we are left no alternative but to make investigations of unlicensed establishments where music is publicly performed, and if infringements of the rights of our members are committed, to redress the same by legal action.

The purpose of this letter is to call your attention to the fact that the infringements were committed, and that we have now no alternative, as trustees for the rights of our members, but to bring suit in the Federal Court to redress the same.

We have no wish to do this, and are entirely willing to grant you a license to publicly perform the compositions copyrighted by our members, if you care to accept the same. Should this be your wish, please carefully fill in and return the enclosed form of application for license, whereupon a rate will be quoted you in line with the tariffs fixed by our Rate Committee, and a license submitted for your signature. If you do not care for a license, we urgently suggest that you discontinue at once the illegal public performance of any copyrighted musical works belonging to our members, as, if infringements are

(Testimony of Herman D. Kenin.)

continued, we will be obliged to file additional suits to redress the same. [102]

Not hearing from you by December 7th, 1936, we shall assume it is your preference that the suit be filed and complaints will thereupon be prepared and entered in the Federal Court of your district.

We sincerely hope that you will cooperate in avoiding litigation. We have no wish for it, but unless the rights of our members under the Copyright Laws of the United States are duly respected, we are left no alternative.

Very truly yours,

HERMAN D. KENIN,
Representative American
Society of Composers,
Authors and Publishers.

enc. application, list, env.
HDK D

[Endorsed]: Pltfs. Ex. #8 adm. [103]

(Testimony of Herman D. Kenin.)

Penalty for Private Use to Avoid Payment of Postage, $300

Post Office Department
Official Business
Registered Article
No. 365764
Insured Parcel
No. ....

Postmark of Delivering
Office
And Date of Delivery

Return to Herman D. Kenin
(Name of sender)
Street and Number
or Post Office Box, 1412 Public Service Bldg.,
Portland, Oregon. [104]

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

TRIANON BALLROOM
(Signature or name of addressee)

....
(Signature of addressee's agent)

Date of delivery, 12/2/36.
Form 3811

[Endorsed]: Pltfs. Ex. #8 adm. [105]

(Testimony of Herman D. Kenin.)

Copy of letter, dated Dec. 22, 1936, from Herman D. Kenin to Mr. John Savage, was then received in evidence and marked "Plaintiffs' Exhibit #11."

PLAINTIFF'S EXHIBIT NO. 11

December 22, 1936

Mr. John Savage,
c/o Trianon Ballroom,
Seattle, Washington.

Re: American Society License
Trianon Ballroom

Dear John:

On December 1st registered notice was sent you of the fact that you were infringing upon copyrights belonging to the members of the American Society of Composers, Authors and Publishers. You were asked at that time to submit an application for the use of these selections. Three weeks have elapsed since that time, and to date no application has been received from you.

This is the last letter I shall write you on this subject. If an application for the use of these selections is not received by return mail, I shall have no other alternative but to report the matter to the New York office of ASCAP, after which, steps shall be taken to enforce these rights by means of the courts.

You are fully familiar with this situation, and I cannot understand your failure to reply.

(Testimony of Herman D. Kenin.)

Very truly yours,

HERMAN D. KENIN,

Representative American
Society of Composers,
Authors and Publishers.

HDK D

[Endorsed]: Pltfs. Ex. #11 adm. [108]

Copy of letter, dated Dec. 15, 1936, from Herman D. Kenin to Mr. John Savage, was then received in evidence and marked "Plaintiffs' Exhibit #12." [43]

PLAINTIFF'S EXHIBIT NO. 12

December 15, 1936

Mr. John Savage,
c/o Trianon Ballroom,
Seattle, Washington.

Re: American Society License
Trianon Ballroom

Dear John:

On December 8th I answered your letter of the 7th. A week has elapsed since that time, and you have failed to send in your application.

It is important that this matter be given your immediate consideration.

With kindest regards, I am

Sincerely,

HERMAN D. KENIN.

HDK D

[Endorsed]: Pltfs. Ex. #12 adm. [109]

(Testimony of Herman D. Kenin.)

Mr. Kenin:

I have known Mr. Savage for about fifteen years and have discussed the situation in the State of Washington with respect to license agreements. On December 1st, 1936, I sent him an application for a license agreement and asked him to fill it out. I received a reply but no mention was contained in it of the license application form. Mr. Savage did not contend or claim to me that he was operating under a license agreement.

He stated to me that he would not take out a license because he was working with the Association in the State of Washington, and also he didn't think it would be right. He said it wouldn't be cooperating with them if he filled out an application by reason of the fact that there were certain suits, legislation and other things going on here.

Some time after the decree of dismissal in the State case at Olympia I succeeded Mr. Jack Stanley as representative of the Society in the State of Washington. I succeeded to his office files and now have them in my possession.

Plaintiffs' Exhibit #7 was in these files, and purports to have been signed by Mr. John L. Stanley.

The procedure we follow in infringement suits is as follows: After evidence of infringement is discovered a registered letter is sent to the infringer calling his attention to the infringement or infringements and the necessity of having a license in order

(Testimony of Herman D. Kenin.)
to perform copyrighted compositions and enclosing a form of application in order to make lawful the unlawful performance.

This was done to Mr. Savage, as shown by Plaintiffs' Exhibit #8. Subsequently, I wrote Plaintiffs' Exhibit #10 on December 8th answering his letter of the 7th, and again on December 15th, which is Plaintiffs' Exhibit #12. I wrote him again on December 22nd, 1936, which is Plaintiffs' Exhibit #11, and then wrote him again on [44] January 4th, 1937, which is Plaintiffs' Exhibit #14, in answer to his letter of December 28th.

Mr. Haugland: You may cross examine.

Mr. Belknap: No questions.

Mr. Haugland: Plaintiff rests.

Mr. Belknap: I will recall Mr. Kenin.

HERMAN D. KENIN,

recalled as a witness for the defendants in causes Nos. 1171 and 1172, was reminded that he was still under oath, and was examined and testified as follows:

Direct Examination

I came into possession and management of all the correspondence formerly had by Mr. Stanley. In that correspondence I did not find any notice of cancellation sent to either the Lockhart Inn or the

(Testimony of Herman D. Kenin.)

Tarry Inn, other than the notice of August 21st, 1935.

JOHN G. LOCKHART,

produced as a witness for defendants, after being sworn, was examined and testified as follows:

Direct Examination

I have no recollection of having received any communication of any kind from the Society, or its representatives, after the suit was dismissed in Olympia in June, 1936, up to the time I was served with process in this suit.

Cross Examination

I reside at the Lockhart Inn, which is located on the Bothel Highway, just outside of Seattle.

Prior to June 8, 1936, I have had visits from representatives of the Society who have come out to collect from me. Subsequent to [45] June 8, 1936, no representatives have come out to see me.

The only license agreement I have had since June, 1936, is the original one taken out in 1931.

I have kept no correspondence file. The bills, I keep, the rest I throw away.

I do not remember receiving plaintiffs' Exhibit #17. "J. G. Lockhart" is my signature. I can't recall signing for a registered letter on the 16th day

(Testimony of John G. Lockhart.)
of December, 1936. I can't recall receiving a registered letter from Herman D. Kenin from Portland, Oregon, on the 16th day of December, 1936.

I have had no agents from the Society call on me since June 8, 1936, and I do not remember talking to a Mr. Merriwether and telling him he would have to see Mr. Heiman, my attorney.

HERMAN D. KENIN,

was recalled as a witness on behalf of plaintiffs and reminded that he was still under oath, after which he was examined and testified as follows:

Direct Examination

Plaintiffs' Exhibit #17 is a copy of a letter sent by registered mail to the Lockhart Inn on December 14th, 1936, attached to it is a return receipt which was returned to me in the mail.

Mr. Haugland:

I offer Plaintiffs' Exhibit #17 in evidence.

Mr. Belknap:

I object on the ground that he had a license and it was not cancelled and they have so stated.

The Court:

You are not objecting on the ground that it is a copy?

Mr. Belknap: No.

(Testimony of Herman D. Kenin.)

The Court:

Objection will be overruled and it will be admitted. [46]

Plaintiffs' Exhibit #17, a copy of a letter from Herman D. Kenin to Lockhart Inn, dated December 14, 1936, with attached return receipt, was then admitted in evidence.

PLAINTIFF'S EXHIBIT No. 17

December 14, 1936

Registered
Lockhart Inn
115th and Victory Way
Seattle, Washington

Re: American Society License
Lockhart Inn

Gentlemen:

Musical compositions copyrighted by our members, list of whom is herewith enclosed, were publicly performed without license at your establishment on December 10th, 1936. Among the selections performed were the following:

"A Beautiful Lady in Blue"
"When I Grow Too Old to Dream"
"You Came to My Rescue"

We have heretofore endeavored to maintain in the State of Washington for the convenience of and service to users of music in public performances, a branch office of our Society and a staff of field

(Testimony of Herman D. Kenin.)

representatives to serve such users of music and our licensees.

However, local State officials have taken such steps as to nullify our desire to render such service, and in these circumstances we are left no alternative but to make investigations of unlicensed establishments where music is publicly performed, and if infringements of the rights of our members are committed, to redress the same by legal action.

The purpose of this letter is to call your attention to the fact that the infringements were committed, and that we have now no alternative, as trustees for the rights of our members, but to bring suit in the Federal Court to redress the same.

We have no wish to do this, and are entirely willing to grant you a license to publicly perform the compositions copyrighted by our members, if you care to accept the same. Should this be your wish, please carefully fill in and return the enclosed form of application for license, whereupon a rate will be quoted you in line with the tariffs fixed by our rate Committee, and a license submitted for your signature. If you do not care for a license, we urgently suggest that you discontinue at once the illegal public performance of any copyrighted musical works belonging to our members, as, if infringements are continued, we will be obliged to file additional suits to redress the same. [116]

Not hearing from you by December 21st, we shall assume it is your preference that the suit be filed,

(Testimony of Herman D. Kenin.)

and complaints will thereupon be prepared and entered in the Federal Court of your district.

We sincerely hope that you will cooperate in avoiding litigation. We have no wish for it, but unless the rights of our members under the Copyright Laws of the United States are duly respected, we are left no alternative.

Very truly yours,

HERMAN D. KENIN,

Representative, American Society of Composers, Authors and Publishers.

enc. application, list. env.

HDK D [117]

Post Office Department
Official Business

——

Registered Article
No. 365850
Insured Parcel
No.........................

Penalty for Private Use to Avoid Payment of Postage, $300

Postmark of Delivering Office
Seattle, Wash
Dec 16
6 PM
University Sta
And Date of Delivery

Return to Herman D. Kenin
(Name of Sender)

Street and Number,
or Post Office Box, 1412 Public Service Bldg.
Portland
Oregon [118]

(Testimony of Herman D. Kenin.)

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Lockhart Inn
(Signature or name of addressee)
J. G. Lockhart
(Signature of addressee's agent)
Date of delivery, 12/16, 1936

Form 3811

[Endorsed]: Pltfs. Ex. #17 Adm. [119]

Mr. Kenin (continuing):

Mr. Lockhart has never tendered any fees or offered to make any payments to me for the privilege or in accordance with the terms of any license agreement since November 5, 1934, which was a payment of $22.50.

Cross Examination

I have never sent Mr. Lockhart a statement because he did not have a license.

Redirect Examination

Plaintiffs' Exhibit #18 is the original copy or record on file of license established . . . I can't give the date of its issuance. Can give the date of its cancellation. It is an original record of the establishment known as Lockhart Inn. It shows it was cancelled as of 10/1/35 for delinquency and owes

(Testimony of Herman D. Kenin.)

for the period January 1, 1935, $67.50 to October 1, 1935. Cancellation notice sent August 21, 1935. This record is part of our original records. We keep a card like this on all licenses.

Mr. Haugland:

I move that plaintiffs' Exhibit #18 be admitted.

Mr. Belknap:

I object on the same ground I have stated repeatedly. Any notice sent on that date would be of no force and effect. A receiver was in charge of their affairs then.

The Court:

Objection overruled. It will be admitted. It may be that it is without effect, if it is incomplete, but it will be admitted. [47]

Card record, with return receipt for registered letter attached, was then received in evidence and marked "Plaintiffs' Exhibit #18."

(Testimony of Herman D. Kenin.)

PLAINTIFF'S EXHIBIT No. 18

(Card)

2-185 Can. 10-1-35 Del.
Lockhart Inn Owes from 1-1-35 67.50
Seattle Yr. 90.00
8-21-35 Canc. sent

Post Office Department
Official business
Registered Article
No. 327555

(Postmarked Seattle,
Washington, Aug 23
10 AM
1935
Terminal Sta.)

Return to American Society of Composers,
Authors and Publishers
1302 Yeon Building—Portland, Oregon
Portland,
Oregon

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

LOCKHART INN
(Signature of name of addressee.)
ANN GERRITZEN
(Signature of addressee's agent.)

Date of Delivery, 8-23, 1935.
Form 3811

[Endorsed]: Pltf's. Ex. #18 Adm. [120]

MAURICE MERIWETHER,

recalled as witness for the plaintiffs, after being reminded that he was still under oath, was examined and testified as follows:

Direct Examination

Early in February, I don't remember the exact date, the first or second week in February, 1937, I was directed to see Mr. Lockhart and ask him whether or not Mr. Jeffery Heiman was his attorney and for the Association at that time. He told me that Mr. Heiman was. I did not discuss with him the matter of whether he had a license or not.

Mr. Haugland:

We move for judgment on the case as it stands. Counsel has interposed no affirmative defense. Certainly he has not made a case that will satisfy the Court that he has a right to play the numbers.

The Court: Motion denied.

MR KENIN:

recalled as a witness for plaintiffs in cause No. 1172, after being reminded that he was still under oath, was examined and testified as follows:

Direct Examination

The establishment operated by Tarry Inn, Inc., at 1409 First Avenue, in Seattle, is called Lyon's Music Hall. So far as I know the Society has never issued a license to Tarry Inn, Inc., to operate Lyon's Music Hall.

(Testimony of Herman D. Kenin.)

Plaintiffs' Exhibit #19 is the license agreement of Tarry Inn, Inc., to operate the Spider Web at 1409 First Avenue in Seattle. It was issued March 8th, 1935, with the limitation that not more than three musicians can be used or it will be null and void. [48]

Plaintiff's Exhibit #20 is the office record of the Spider Web, Seattle, Washington, from the records under my direction and purports to show license was cancelled as of September 1st, 1935, letter sent out August 21, 1935, return receipt attached to it.

> Original license agreement between American Society of Composers, Authors and Publishers, and Spider Web and Tarry Inn, Inc., dated March 8, 1935, was then received in evidence without objection, and marked "Plaintiffs' Exhibit #19."

PLAINTIFF'S EXHIBIT No. 19

(General)

Copy

Memorandum of Agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and Tarry Inn, Inc. Spider Web, 1409 First Avenue, Seattle, Washington (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one year commencing March 1st, 1935, a license to publicly perform at Spider Web, 1409 First Avenue, Seattle, Washington, and not else-

(Testimony of Herman D. Kenin.)

where, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(Testimony of Herman D. Kenin.)

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States

(Testimony of Herman D. Kenin.)

mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of One Hundred Eighty and no/100 ....Dollars ($180.00) annually, payable quarterly in advance, $45.00 per quarter.

*This license rate to be in effect only as long as present policy is maintained; namely, not more than three musicians six days per week—no cover charge.

In Witness Whereof, this agreement has been duly subscribed and sealed by Society and Licensee this Mar. 8-1935.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
By HERMAN GREENBERG
Agent and Attorney in Fact
SPIDER WEB-TARRY INN, INC.
By M. M. LYONS

[Endorsed]: Pltfs. Exhibit #19 Adm. [121]

Mr. Haugland:

I offer Plaintiffs' Exhibit #20 in evidence.

Mr. Belknap:

Objection on the same ground as before.

The Court:

Objection overruled. It will be admitted.

(Testimony of Herman D. Kenin.)

Card Record, with return receipt attached, was then received in evidence and marked "Plaintiffs' Exhibit #20."

PLAINTIFF'S EXHIBIT No. 20

(Card)

2-43 | Can. 9-1-35 Del.
Spider Web | Owes from 5-1-35
Tarry Inn, Inc. | Yr. 180.00
Seattle
8-21-35 Canc. sent

Post Office Department
Official Business
Registered Article
No. 327553

(Postmarked Seattle, Washington, Aug 23 10 AM 1935 Terminal Station)

Return to American Society of Composers, Authors and Publishers
1302 Yeon Building, Portland, Oregon
Portland,
Oregon

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

SPIDER WEB
(Signature of name of addressee)
J. CURRY
(Signature of addressee's agent)

Date of delivery, 8-22, 1935.

Form 3811

[Endorsed]: Pltf's. Ex. #20, Adm. [122]

(Testimony of Herman D. Kenin.)

Mr. Kenin (continuing):

I have never received any money or offer of payment from Tarry Inn for any license.

Cross Examination

I have never sent him any statements because we only send statements to licensees. I know it refers in the contract to the Spider Web at 1409 First Avenue, and that is the same location as the Music Hall. It is the same premises but a different operation. A different establishment entirely.

MAURICE MERIWETHER,

recalled as a witness for the plaintiffs, was reminded that he was still under oath, examined, and testified as follows:

On December 4, 1936, I investigated the premises known as Lyons Music Hall, 1409 First Avenue, in Seattle, and observed that there were four musicians playing there, pipe organ, drums, saxaphone and trumpet. [49]

Mr. Belknap:

I have no cross-examination. [50]

Tacoma, Washington
December 10th, 1938

Be It Remembered that the above entitled causes came on for further trial on the merits in the Court

Room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon of December 10th, 1938, before the Honorable Edward E. Cushman, United States District Judge, one of the Judges of said Court.

Plaintiffs in all cases were represented by H. W. Haugland of Seattle, Washington, and Herman D. Kenin, of Portland, Oregon. The defendants in all cases were represented by Clark R. Belknap of Seattle, Washington.

Mr. Haugland:

We have had taken some depositions . . . a deposition in each case, of Mr. Stanley. The depositions are here but they have not been published. We would like to have them published at this time.

The Court: Ordered published.

(Depositions in question were then published by the Clerk.)

Mr. Haugland: (reading)

"JOHN L. STANLEY:

He is called as a witness and, after being duly sworn, to tell the truth, the whole truth, and nothing but the truth, testifies as follows in answer to interrogatories:

"My name is John L. Stanley, residing at 1303 South College, Tulsa, Oklahoma, now District Manager for Western Electric Hearing Aids.

(Deposition of John L. Stanley.)

"I was connected with the American Society for nine years prior to April of 1938. I started in working for them as office boy in the New York office and continued upward to the position of District Manager in the Seattle office for the State of Washington and for Alaska. My position in the Seattle office was that of [51] District Manager.

"I was connected with the society during the month of August, 1935. I recognize plaintiff's exhibit #7 as a carbon copy of a letter dictated by me to my secretary, Miss Marjorie Armitage, in Seattle, Washington. I caused this letter to be sent by registered United States mail and mailed in the Seattle Post Office. I recall this particular instance very well, due to the fact the Trianon Ball Room was one of the largest users of music in the State of Washington. I personally signed the letter. I caused the original of said exhibit to be prepared and signed the same and directed it to be mailed by registered United States mail in the Seattle Post Office.

"I had received no correspondence subsequent to May 27, 1935, with the Trianon Company, nor did I receive any correspondence from its officers.

"My recollection of the status of the account of the Trianon Company at the time of May 27, 1935, is that it was either paid to date or slightly delinquent.

"On two occasions subsequent to May 27, 1935, Mr. Savage, manager of the Trianon Ball Room,

(Deposition of John L. Stanley.)

called at my office for the purpose of discussing what the rate for his new license would be, inasmuch as it was no longer feasible for the Society to continue his canceled license at the previous rate. I recall that there was an express difference of opinion by Mr. Savage as to what Mr. Savage thought was a rate he should pay in comparison to the schedule of fees set forth by the American Society. The result of the first visit brought no conclusions and the same applies to the second visit to my office. I also had conversations with Mr. Savage at his office in the Trianon Ball Room relative to the prior cancellation of his license and the issuance of a new one. He refused to take out the new license up until the time I left the Seattle office. [52]

Cross-Interrogatories of Defendant
Trianon Ballroom, Inc.

Yes. I married a niece of E. C. Mills, the general manager of the Society. Plaintiffs' exhibit #5 was mailed at the registry window of the United States Post Office at Seattle. I did not mail it personally, but instructed my secretary to mail it. I confirmed this mailing the next day.

I believe that a temporary receiver was appointed to take over the Seattle office, and believe that the date was August 13, 1935.

In order that there would be no question as to the Society's operations in the state of Washington after August 13, the Society instructed me to mail

(Deposition of John L. Stanley.)
from Portland, Oregon, letters to all the licensed establishments in Washington that, in accordance with their licenses with the Society, said licenses were to be cancelled by the Society. Beyond the mailing of these letters of cancellation, I had, and exercised, no authority over the establishments licensed by the Society in the state of Washington, after August 13, 1935.

The conversations I previously referred to as having had with Mr. Savage took place both in my offices in the Skinner building and in the offices of Mr. Savage in the Trianon Ball Room. These conversations took place during the months of June and July, 1935.

Making the Witness an Adverse Witness for the Defendant, the Following Interrogatories are Propounded.

The dancing establishments in the state of Washington that were paying as high fees as the Trianon Ball Room, to the best of my recollection were the Olympic Hotel in Seattle, the Century Ball Room north of Tacoma, and, undoubtedly, other establishments were paying fees as high, or higher, than the Trianon Ball Room.

Mr. Haugland:

I will now read the deposition in the Tarry Inn case, being [53] cause No. 1172, going directly to the testimony. (Reading)

"JOHN L. STANLEY,

He is called as a witness, and, after being duly sworn, to tell the truth, the whole truth, and nothing but the truth, testifies as follows in answer to interrogatories:

Plaintiffs' Exhibit #20 is a form file which was kept for any establishment whose license was cancelled for reason of delinquency insofar as their license fees are concerned. I caused this card to be made up by my bookkeeper after I instructed her to inform the proprietors that their license was to be cancelled for delinquency. It was prepared at my direction and as one of the original records that was kept by me. A similar card was kept on all establishments whose licenses may have been cancelled for similar reasons.

Plaintiffs' proposed exhibit marked for identification as exhibit A is a form letter which was sent to establishments in the State of Washington for reasons which appear to be explanatory in the contents of the letter.

The form letter referred to was then received in evidence marked "Plaintiffs' Exhibit #21, and is made a part hereof.

PLAINTIFFS' EXHIBIT NO. 21

EXHIBIT A
FORM

(Copy)

Please be advised that your license to publicly perform musical compositions, copyrighted by our

(Deposition of John L. Stanley.)

members, expires as of September 1, 1935. The American Society of Composers, Authors and Publishers is no longer continuing, for the service of licensees, a representative in Seattle, for reasons with which you are no doubt acquainted.

The rights of our members, as copyright owners, are in no way affected by the pending litigation.

If you wish license to continue the lawful performance of musical works, copyrighted by our members, a list of which members is herewith enclosed, please so adivse this office, and the necessary arrangements will be made from here.

Unless such license is secured, please do not permit such compositions to be rendered in your establishment, as if you do, we shall have no alternative but to protect, in the Federal Courts, the rights of our members.

Kindly let us know by return mail, if you wish this license.

Our inspectors regularly visit all unlicensed establishments to assure that the rights of our members are not infringed upon.

Under the copyright law of 1909, minimum damages for each infringement are fixed at $250.00.

We have no wish to sue you—and we hope you will not make it necessary.

We thank you for business given us in the past, and hope to receive your answer with application for license, on the enclosed form, by return mail.

(Deposition of John L. Stanley.)

Yours very truly,

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

JOHN L. STANLEY.

[Endorsed]: Pltfs. Ex. #21 adm. [123]

I believe at this time that plaintiffs' exhibit #21 does not have any connection with plaintiffs' exhibit #20. I think that another form letter, namely, a letter cancelling the licenses for delinquency, would have a bearing with exhibit #20. It is possible, however, that exhibit #21 could have a connection with exhibit #20 insofar as my office mailed the original of form exhibit #21 to proprietors of Tarry Inn.

I do not recall Tarry Inn as ever having a license under the name of Lyon's Music Hall. My recollection was that it was known as the Spider Web.

My recollection of the exact status of the account with the defendant company as of August 23, 1935, is that on that particular [54] day it was delinquent. The exact dollars and cents status I cannot recall.

I do not recall any specific conversations with the defendant relative to the status of his account, although it is quite possible that prior to August 12th I discussed the matter of the delinquent fees with the proprietor."

Mr. Haugland:

There were no cross interrogatories.

(Deposition of John L. Stanley.)

I will next read the deposition of John L. Stanley in the Lockhart case, being No. 1171. (Reading:)

"JOHN L. STANLEY:

He is called as a witness and after being duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows in answer to interrogatories:

Plaintiffs' Exhibit .... is the same type of card as referred to in this question and was made up and kept for the same reason, namely; notice was sent to the establishment that the Society license, because of the delinquency of the license fees, was to be cancelled for that reason. I caused this exhibit to be prepared. I instructed my bookkeeper to type on it the necessary information as to the status of the account, and to send a letter to the establishment informing them that their Society license was to be cancelled for reason of its delinquency in fees. The letter was sent by Registered United States mail from Seattle. My office instructed the Post Office to inform us that the registered letter had been received by sending us a return receipt which is attached to the exhibit. When the return receipt came back from the Post Office I instructed my bookkeeper to attach it to the original card in the file and return it to the file.

Exhibit A is a form letter which was sent to establishments in the state of Washington for reasons which appear to be explanatory in the contents of

(Deposition of John L. Stanley.)
the letter. I do not believe at this time that Exhibit A has any connection with Exhibit #18. It is possible [55] however, that Exhibit A could have a connection with Exhibit #18 insofar as my office mailing the original of form Exhibit A to proprietors of John G. Lockhart and Jane Doe Lockhart.

Beyond the fact that the account was delinquent in its license fees, I do not recall the exact dollars and cents status of the account with defendant company as of August 23, 1935.

I recall on several occasions calling at the establishment of the defendant in an effort to collect the license fees, which were due the Society. I can't recall the exact wordage, beyond the fact that I requested the establishment to bring the account to date."

Mr. Haugland: There were no cross interrogatories.

I do not believe, counsel, that we have made a definite stipulation that these actions are consolidated for the purpose of trial, and that the evidence in one is to be considered in connection with the evidence in the other cases. Is that your understanding?

Mr. Belknap: Yes, any evidence applicable to the other cases. Any general testimony, yes.

MAURICE MERIWETHER,

recalled as a witness for plaintiffs, was examined and testified as follows:

On approximately February 17th, 1937, I called on Mr. Lockhart and introduced myself, telling him I was with the Society and asked him if it was true that Mr. Heiman was representing him. He said that Mr. Jeffery Heiman was his attorney in these matters pertaining to the American Society of Composers, Authors and Publishers, and all dealings we would have with him must be done with Mr. Heiman.

Between February 4th and 23rd I had several conversations with Mr. Heiman, and after seeing Mr. Lockhart I again saw Mr. Heiman and at that time we were making contracts retroactive to [56] 1936 . . . as of January 1st, 1936. Mr. Heiman wanted us to date the contracts as of January 1st, 1937, assuring me that if that was done he would see that Mr. Lockhart would sign his license agreement.

Mr. Heiman did not contend that Mr. Lockhart was licensed.

Mr. Heiman represented other establishments besides Lockhart, the Lyons Music Hall being one.

Mr. Belknap: I have no questions and move to strike out all of his testimony as irrelevant and immaterial and having no bearing on the issues in this case.

The Court: Denied subject to consideration upon the whole case.

Mr. Haugland: In connection with the Tarry Inn case, I wish to introduce the form letters, the originals of which have been introduced in the Lockhart case.

Mr. Belknap: No objection.

Copies of letters dated Dec. 5, 1936, and January 12, 1937, both addressed to Lyon's Music Hall and signed by Herman D. Kenin, were then received in evidence and marked respectively "Plaintiffs' Exhibit #22 and Plaintiffs' Exhibit #23."

PLAINTIFFS' EXHIBIT NO. 22

December 5, 1936
Registered

Lyon's Music Hall,
1409 First Avenue,
Seattle, Washington.

Re: American Society License
Lyon's Music Hall

Gentlemen:

Musical compositions copyrighted by our members, list of whom is herewith enclosed, were publicly performed without license at your establishment on December 4th, 1936. Among the selections performed were the following:

"Pennies From Heaven"
"When Did You Leave Heaven"
"You Turned The Tables On Me"

We have heretofore endeavored to maintain in the State of Washington for the convenience of and

service to users of music in public performances, a branch office of our Society and a staff of field representatives to serve such users of music and our licensees.

However, local State officials have taken such steps as to nullify our desire to render such service, and in these circumstances we are left no alternative but to make investigations of unlicensed establishments where music is publicly performed, and if infringements of the rights of our members are committed, to redress the same by legal action.

The purpose of this letter is to call your attention to the fact that the infringements were committed, and that we have now no alternative, as trustees for the rights of our members, but to bring suit in the Federal Court to redress the same.

We have no wish to do this, and are entirely willing to grant you a license to publicly perform the compositions copyrighted by our members, if you care to accept the same. Should this be your wish, please carefully fill in and return the enclosed form of application for license, whereupon a rate will be quoted you in line with the tariffs fixed by our Rate Committee, and a license submitted for your signature. If you do not care for a license, we urgently suggest that you discontinue at once the illegal public performance of any copyrighted musical works belonging to our members, as, if infringements are continued, we will be obliged to file additional suits to redress the same. [124]

Not hearing from you by December 12th, we shall assume it is your preference that the suit be filed,

and complaints will thereupon be prepared and entered in the Federal Court of your district.

We sincerely hope that you will cooperate in avoiding litigation. We have no wish for it, but unless the rights of our members under the Copyright Laws of the United States are duly respected, we are left no alternative.

Very truly yours,

HERMAN D. KENIN,

Representative American Society of Composers, Authors and Publishers.

[125]

Penalty for Private Use to Avoid Payment of Postage, $300

Post Office Department

Official Business

Registered Article

No. 365785

Insured Parcel

No. ....

Postmark of Delivering Office

Seattle, Dec. 8, 3:30 P.M., 1936

Wash.

And Date of Delivery

Return to Herman D. Kenin

Street and Number,

or Post Office Box, 1412 Public Service Bldg.

Portland, Oregon [126]

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Lyons Music Hall
(Signature or name of addressee)
Paul Wallace
(Signature of addressee's agent)

Date of delivery, 12/8, 1936.

[Endorsed]: Pltfs. Ex. #22 Adm. 12/10/38. [127]

PLAINTIFFS' EXHIBIT NO. 23

January 12, 1937

Registered

Lyon's Music Hall,
1409 First Avenue,
Seattle, Washington.

Re: American Society License
Lyon's Music Hall

We wrote you on December 5th calling your attention to the unlawful performance of our members' selections in the Lyon's Music Hall.

We cannot understand your failure to apply for a license to make this performance lawful. The only way we can protect our members against this confiscation of their valuable copyrights is either by issuing a license or by bringing action in the Federal Courts based upon copyright infringement. We hesitate to take this step, because if and when we do, and if we are able to prove that these selections have been performed without a license, the

infringer is required to pay not only court costs, attorneys' fees and costs of investigation, but damages as well. The law provides that the minimum amount of damages recoverable in these suits is $250.00. We do not wish to add this burden to your cost of doing business, but in all fairness you must understand that we, as trustees, must enforce the law in behalf of our members.

On January 9th further evidence of infringement was obtained in your establishment. Among the selections reported were:

> "Don't Blame Me"
> "I'm in the Mood for Love",

and many others.

Over thirty days have elapsed since we called your attention to the need for this license, and of course your previous experience with the Copyright Law should have informed you by this time that these rights must be respected.

We are again calling this matter to your attention with the hope that suit to protect our members' rights will not be necessary. We must have an immediate response.

Very truly yours,

HERMAN D. KENIN,
Representative American
Society of Composers,
Authors and Publishers.

enc. application, env.
HDK D

[Endorsed]: Pltfs. Ex. #23 adm. 12/10/38. [128]

Penalty for Private Use to Avoid Payment of
Postage Due, $300
Post Office Department
Official Business
Registered Article
No. 365873
Insured Parcel
No. ....
Postmark of Delivering Office
Seattle, Jan. 13, 3:30 P.M., 1937
Wash.
And Date of Delivery

Return to Herman D. Kenin
Street and Number,
or Post Office Box, 1412 Public Service Bldg.
Portland, Oregon [129]

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Lyons Music Hall
(Signature or name of addressee)
Irving H. Blowers
(Signature of addressee's agent)

Date of delivery, 1/12, 1937.

[Endorsed]: Pltfs. Ex. #23 Adm. 12/10/38. [130]

HERMAN D. KENIN,

produced as a witness for the plaintiffs, was sworn and examined as follows:

Direct Examination

I sent the originals of plaintiffs' exhibits #22 and #23 to Tarry Inn prior to the institution of suit. I did not receive any response except in general negotiations with Mr. Jeffery Heiman for licenses for all establishments claimed by him as clients. These negotiations were not successful in placing the establishments under license. These two exhibits are similar in form to the exhibits [57] that were sent to Lockhart. Our only response from Mr. Lockhart was through Mr. Heiman.

Mr. Belknap: No cross examination.

HERMAN D. KENIN,

produced as a witness for defendant, after being duly reminded that he was still under oath, was examined and testified as follows:

Direct Examination

I can't say, without consulting our records, what establishments were paying a higher license fee than the Trianon Ball Room. I know one establishment . . . the Olympic Hotel. I know their rate is higher than the Ball Room, but I am only trying to recall from memory. I do not know off hand what the exact rates of any establishments are.

Cross Examination

The later license of the Olympic Hotel called for a rate of $30 per month. I do not know what the 1935 rate was.

JOHN E. SAVAGE,

produced as a witness for the defendants, was duly sworn and testified as follows:

Direct Examination

I am familiar with the operation of the Olympic Hotel. They use three or four different ball rooms, lobby and dining room. They have sometimes as high as three orchestras at once. About a week ago I checked the post office records where all registered letters are sent from and the records are kept complete. The gentleman in charge of that department, Mr. Belknap and Mr. Lyons were with me at the time. He had a book that shows the complete record of May 27th, 28th and 29th. A big book with a record of every letter sent.

Q. In that record did you find any record of a letter purporting to be mailed by the American Society either to yourself individually [58] or the Trianon Ball Room?

Mr. Haugland: I object to that question . . . if he is attempting to testify what the records show I imagine the record would be the best evidence, not what he may have gathered from it. I object also on the grounds that he is not a competent witness to

(Testimony of John E. Savage.)
prove this. They could bring the clerk who is in charge of the records.

The Court: Objection overruled.

A. The Post Office department has no record of any such letter ever having been mailed through that office to me individuallly or the Trianon. I asked him specifically.

Cross Examination

I was not told by the Post Office department that they destroy all records of these letters after two years. The dates were stamped on the book. Anybody can see it.

The book contains a record of all registered letters sent through that office. There is a record in that book. . . every line has a different registry number and every letter registered out is marked right down. A permanent record is kept.

I have kept no office file of my letters and correspondence with the Society.

CLARK R. BELKNAP,

was sworn, as a witness for the defendant, and made the following statement:

If the court please, I would like to ask myself merely the question relative to the examination of those post office records. My testimony is identically the same as that of Mr. Savage. If counsel would like to have me go into specific details I will.

Mr. Haugland: I will object to his testimony on the same grounds as that of Mr. Savage, that it is not the proper way to establish the [59] record. We do not have the records here, and the witness is not competent to testify as to something of record.

The Court: Objection overruled. [60]

Tacoma, Washington,
February 13, 1939.

Be It Remembered that the above entitled causes came on for hearing upon the motion of the plaintiffs for judgment notwithstanding the memorandum decision or, in the alternative, for a new trial in the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon of February 13, 1939, before the Honorable Edward E. Cushman, United States District Judge, one of the Judges of the said court, and counsel for all parties being present and announcing themselves as ready, the following proceedings were had:

Mr. Haugland, attorney for the plaintiffs, presented his argument in support of his motion, and thereupon Mr. Belknap responded to the argument, and at the conclusion of the argument the Court announced that he was of the same opinion, and that he was going to give judgment for the defendants in the Trianon, Lockhart and Tarry Inn cases. The Court thereupon stated, with respect to the attorney's fees to be allowed:

The Court: You have stated Mr, Haugland, in the cases in which you prevailed, that you would be satisfied with a nominal attorney's fee. Are you still of the same mind?

Mr. Haugland: I am. I feel that nominal attorney's fees are the only fees that should be awarded in these cases.

The Court: In the Cleveland and Scribner cases, in which the plaintiff has prevailed, I will allow an attorney's fee of $25 in each case, to be awarded in addition to the statutory fee. With respect to the cases in which the defendants have prevailed, Mr. Haugland, do you have any objecion to an allowance of a fee of $100 in each case? [61]

Mr. Haugland: I consider that such a fee would be extremely liberal. However, if the Court feels that such a fee should be allowed to the defendants, I am not going to raise any objection.

Mr. Belknap: I feel that the fee of $100 would not be sufficient, and that a larger fee should be awarded to the defendants in these cases. I have no objection to the plaintiffs having a larger fee awarded to them in the cases in which they have prevailed.

The Court: Are you objecting to an allowance of $100 as being reasonable in your cases, Mr. Belknap?

Mr. Belknap: I am. I desire to be heard on the matter.

The Court: Have counsel prepared the findings and the decrees for presentation this morning?

Mr. Haugland: I have my findings and decrees ready in the Scribner and Cleveland cases.

Thereupon the findings were presented in the Cleveland case and the Court made some corrections in said findings and signed the same. The form of the decree not being quite satisfactory, the parties agreed to get together and draft findings and decrees in conformity with suggestions made by the Court, and the cause was continued to some further date, when the matter should again be presented to the Court. [62]

Tacoma, Washington,
March 10, 1939.

Be It Remembered that the above entitled causes came on for hearing on the presentation and settlement of Findings of Fact, Conclusions of Law and Decrees, in the Court room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon of March 10th, 1939, before the Honorable Edward E. Cushman, United States District Judge, one of the Judges of said Court.

Plaintiffs in all cases were represented by H. W. Haugland of Seattle, Washington, and

Defendants in all cases were represented by Clark R. Belknap of Seattle, Washington, one of the attorneys of record in such cases, and the following proceedings were had:

Mr. Belknap: I will call Mr. Ross as a witness on the amount to be allowed as attorney's fees in these cases.

BERT C. ROSS,

called as witness on behalf of defendants, after being duly sworn, was examined and testified as follows:

Direct Examination

My name is Bert C. Ross. I am an attorney, practicing in Washington since 1915. I have served two terms on the Board of Governors of the State Bar Board. I have handled both civil and criminal cases.

Q. You have examined the files in the case of Buck vs. Trianon, Buck vs. Lockhart and Buck vs. Tarry Inn?

A. I haven't examined the file in court. I had exhibited to me some minutes ago your file with reference to the litigation.

Q. I will ask you to state what, in your opinion, would be a reasonable attorney fee to be allowed the defendant in each of those cases?

Mr. Haugland: Just a moment . . . I would like to object to the question as [68] calling for a conclusion of the witness, who has stated that he is not familiar with the issues in the case.

The Court: Objection overruled. You can develop any weakness in the testimony because of that fact in your cross examination.

A. My opinion is that $100 per count would be a reasonable attorney's fee.

Cross Examination

I have not examined the court files. I read the pleadings in Mr. Belknap's file and I saw that there

(Testimony of Bert C. Ross.)
had been a considerable amount of preliminary motions disposed of. I couldn't tell you now what these were. My opinion of the issues involved in these cases is that they were copyright infringements, based upon the playing of certain copyrighted music in dance halls. I think that the cases would require a particular knowledge of copyright law, and this is one of the things I have taken into consideration in forming my opinion. If the performance of the musical numbers was admitted, that would eliminate some of the work of preparation, so far as the facts are concerned.

Q. Have you ever tried any copyright cases?

A. I have not.

Q. You do not know anything about fees to be awarded in copyright cases?

A. Yes. My opinion is influenced by what is shown to have been the allowances made by Federal courts.

Q. Mr. Belknap has shown you . . . has he, Mr. Ross . . . some decisions?

A. He has called my attention to some of the decisions.

Q. Because certain fees were allowed in certain cases, you deduce that similar allowances should be made here?

A. Not wholly that. I am frank to say that I am influenced quite considerably by those cases. [64]

Q. If the practice of this court had been to allow a fee of $50, would that influence you?

(Testimony of Bert C. Ross.)

A. I would take that into account if it were called to my attention. That has not been called to my attention. I stated that $100 was a proper amount for a fee per count. I am taking into consideration that a number of counts were tried together. Perhaps it would not make a great deal of difference whether there was one count or a dozen counts in each cause of action, excepting that there is involved the amount of a possible recovery against the client, and I have taken that into account. It is my understanding that the minimum recovery against defendants would be $250 per count, and the maximum would be $5,000 per count.

Q. Now, Mr. Ross, assuming that there is only one issue in the trial of this case that you are testifying about, and that is whether a pre-existing license was cancelled. That's the only issue . . . was a pre-existing license cancelled. Assuming that is the fact . . .

Mr. Belknap: I object to that.

Mr. Haugland: I haven't finished the question yet.

Q. (Continuing) —and that the question of the number of counts would be only incidental, the number of musical numbers or selections played at the defendant's place of business was only incidental. That is the only issue in this case, would your opinion with respect to the reasonableness of the attorney's fee be influenced by that . . .

Mr. Belknap: I object, if the court please, to the question because counsel well knows that is not

(Testimony of Bert C. Ross.)
in conformity with the facts. He [65] knows other defenses were set up and considered.

The Court: Objection sustained.

Mr. Ross: (continuing): I saw a voluminous file in each one of the defendants' cases. I would not undertake to specify the work that was done, but I was impressed with the amount of work that had been done in connection with each case. I examined the affirmative matter set up in defendants' answer, but I couldn't tell you now what it was. I do not consider myself an expert in this type of litigation. I read the affirmative matter in the answers some two or three months ago, and I am not an expert on pleadings, but I would try, myself, to plead it in a shorter number of pages. If the only defense was that the plaintiffs were an illegal combination, I do not think it would make any more work if there were one or five counts. With respect to the fact that most of defendants' counsel's work was in arguing the plaintiffs' motion to strike the affirmative matter, and the defendants' counsel presented that matter to the Court on several different occasions by way of reargument, I still think, if the defendants' counsel injected the issue in good faith, the fact that the Court held against him on each occasion should make no particular difference. I think the Court should take into account the amount of work which he did if it was done in good faith. My estimate of fees is not based upon any contingent basis. It is based upon the amount of work that

(Testimony of Bert C. Ross.)

was done. The fact that the Court held against him on that particular issue should not deprive counsel of being compensated for his work. My opinion here is arrived at on the same basis on the charge that should be made against the client. I know that it is true that the courts do not award as costs the same amount that one would charge against his clients. It has been my experience that the courts have [66] not awarded as costs the same fees which the attorney would charge his client.

The fact that five cases were consolidated for trial should be taken into account too. I am taking into account the fact that it has been a consolidation here, and I am also taking into consideration the number of counts in a case, and I am also taking into account the amount of possible recovery, whether for plaintiff or defendant. I have never had a copyright case myself, and I have never made a charge for services in a copyright case. I had a trademark litigation about 1932 or 1933 in Olympia, in the State court.

Redirect Examination

In cases of suits on promissory notes, the practice is to ask for an attorney's fee upon each note. My attention was called to a case where a $1,000 fee had been allowed. In none of these cases shown me by Mr. Belknap was there allowed a fee of less than $100. I read about a half-dozen cases. I have

(Testimony of Bert C. Ross.)
not been impressed with the idea that the plaintiff was likely to recover more than $250 per count.

Recross Examination

The allowance of attorney's fees in suits on promissory notes is generally based upon a provision in the note, and if suits were brought up on a series of promissory notes, I do not think the Court would allow $100 on each note as a reasonable attorney's fee. I think that the amount of work ordinarily involved on a promissory note is a much smaller proportion than is involved in this type of litigation here. I think that, even though the copyrights were admitted, that there would still be a question of copyright law involved in the case.

Q. What were the issues in this particular case that were more than the simple suit? I want you to be more specific. [67]

A. You would have to make provision for some of the defenses raised to it. You would have . . .

Q. You tell us. What are the defenses that involved copyright law that you have been talking about? What defenses in these cases involved any principle of copyright law or patent law?

A. The very bringing of the suit involving infringement immediately involves an investigation into copyright law. That very thing directs you to the copyright law. Then this affirmative defense of the matter of being an illegal combination, in order to present that defense and the law with reference to it, naturally a lawyer to do it would read the cases

(Testimony of Bert C. Ross.)
having to do with copyright infringment to find out if he could cases where successful defense was made because of illegal combination of the people holding the copyrights.

Q. That's in the preparation of the case?

A. That is in the preparation of the case.

Q. If those issues have been boiled down and you come to the trial of the case and it is much more simplified and the question is not over any infringement but is whether or not a license is cancelled, it is purely a simple question, is it not?

A. That one issue alone would be a simple issue . . . a simple issue of fact.

Q. Therefore the matter of attorneys' fees might be lessened in your opinion if that were the situation?

A. If that were the only issue here and the issues were made up on that basis to start with and there was no work other than preparation for the trial of an issue of fact I would think that $100 per count was too much.

I testified that I had read five or six cases, and these cases were called to my attention by Mr. Belknap, and were the only ones that I have read, and I have given great weight to those cases. [68] If it were called to my attention that the Court had established a lower rate, and that the Court, in cases of default judgments, had allowed $25 or $50 as attorney's fees in this type of litigation, I think that I would take that into consideration.

(Testimony of Bert C. Ross.)

The Court: Five hundred dollars will be allowed in the Trianon case, four hundred dollars in the Tarry Inn case and seven hundred fifty dollars allowed in the Lockhart.

Mr. Haugland: Will the Court allow us an exception?

The Court: Exceptions allowed.

(The Court then signed Findings of Fact, Conclusions of Law and Decrees in all three cases submitted by the defendants and denied the Findings, Conclusions and decrees submitted by complainants, allowing exceptions in all cases.)

[Endorsed]: Filed Jun. 15, 1939. [69]

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS

Come now the appellants above named, and each of them, and their counsel H. W. Haugland, of Sweeney & Haugland, and Herman D. Kenin, and respectfully stated that the points upon which they intend to rely in support of their claim that the District Court erred in granting judgment for the defendants in the three cases being appealed as one record, viz: Buck et alles vs. Trianon, Cause No. 1162, Buck et alles vs. Lockhart, Cause No. 1171, and Buck et alles vs. Tarry Inn, Cause No. 1170, and in refusing to grant judgment in each of the

three cases for the plaintiffs, in accordance with the allegations of the bills of complaint, are as follows:

I.

Referring to the Trianon case, Cause No. 1162:

1. That the court erred in refusing to grant judgment of infringement for the complainants.

2. That the court erred in holding that the defendant, the Trianon, had a valid and subsisting license from the American Society of Composers, Authors and Publishers on November 30, 1936, and further erred in holding that the said license had not been cancelled [70] theretofore by the said Society.

3. That the court erred in permitting, over objection, the testimony of John Savage and Clark Belknap, defendant's witnesses, with respect to their alleged search of postoffice records.

4. That the court erred in failing to hold that the conduct of the parties prior to November 30, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting defendant an attorney's fee in the sum of $500, and that the said sum was exorbitant.

6. That the court erred in granting judgment for the defendant.

II.

Referring to the Lockhart case, Cause No. 1171:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 10th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendants was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 10, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the [71] defendants.

III.

Referring to the Tarry Inn case, Cause No. 1170:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 4th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendant was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 4, 1936, showed a complete abandonment of any con-

tractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the defendants.

H. W. HAUGLAND,
HERMAN D. KENIN,
Attorneys for Plaintiffs.

Received a copy of the Within this 27th day of June, 1939.

CLARK R. BELKNAP.

[Endorsed]: Filed Jun 29, 1939. [72]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on duly and regularly to be heard in open court, the plaintiffs appearing by their attorneys H. W. Haugland, Herman D. Kenin and Clifford D. O'Brien, and the defendant appearing by its attorneys Hammer & Pomeroy and Clark R. Belknap; and evidence having been duly and regularly introduced by and on behalf of the plaintiff and defendant; and the court after being fully advised in the premises, makes the following

FINDINGS OF FACT:

I.

That the plaintiff, American Society of Composers, Authors and Publishers, hereinafter referred to as the Society, was duly organized under the laws of the State of New York; that all of the corporate plaintiffs and the defendant are duly organized corporations.

II.

That each and all of the musical works named in plaintiff's bill of Complaint were, at all dates mentioned in the complaint, and now are owned by the incorporated plaintiffs in this suit.

III.

That the various musical works named in the bill of complaint were performed by defendant at the time and place alleged in the complaint; that prior to the date of said performances, the plain- [78] tiffs issued a license to defendant granting the right to perform in its place of business the aforesaid musical works, which license was in effect on the date of said performances.

IV.

That $500.00 is a reasonable sum to be allowed the defendant as attorney's fees in this suit.

Done in Open Court this 10th day of March, 1939.

EDWARD E. CUSHMAN,

Judge.

And from the foregoing Findings of Fact the court makes the following

Conclusions of Law

First: That plaintiffs take nothing and that their cause of suit be dismissed with prejudice and held for naught.

Second: That the defendant is entitled to a judgment against the plaintiffs and each of them for the sum of $500.00 as and for attorney's fees and for its costs herein.

Done in Open Court this 10th day of March, 1939.

EDWARD E. CUSHMAN,
Judge.

Presented by:
CLARK R. BELKNAP,
Atty. for Def.

[Endorsed]: Filed Mar. 10, 1939. [74]

United States District Court, Western District of Washington, Northern Division.

No. 1162

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPELL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Plaintiffs,

vs.

TRIANON COMPANY, INC., a corporation,

Defendant.

DECREE

This cause came on for trial at this term of court on the 14th day of October, 1938, and all parties being present in court and represented by counsel, and both sides announcing themselves ready for trial, the court proceeded to hear the evidence, and all the evidence being concluded on behalf of both parties, and the matter being submitted to the court for its consideration and determination, and the court having duly considered the proofs offered, and being fully advised in the facts and premises, and having caused findings of fact and conclusions of law to be prepared, reduced to writing, and to be signed and filed herein, it is by the court

Ordered, Adjudged and Decreed as follows:

First: That plaintiffs take nothing, and that their cause of suit be, and the same is hereby dismissed with prejudice, and held for naught.

Second: That the defendants have judgment against the plaintiffs, and each of them, in the sum of $500 as and for attorneys' fees, and for its costs of this suit to be taxed, and that defendant have execution therefor. [75]

Done in Open Court this 10th day of March, 1939.

EDWARD E. CUSHMAN,
Judge.

Presented by:
CLARK R. BELKNAP,
Atty. for Def.

[Endorsed]: Filed Mar. 10, 1939. [76]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE MEMORANDUM DECISION, AND, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL OR PETITION FOR REHEARING.

Come now the complainants above-named, and each of them, and respectfully move the court for a judgment in favor of the complainants, in accordance with the prayer in the Complaint contained, notwithstanding the Memorandum Decision of the Court, for the reason and on the grounds that

the said decision is contrary to the law and to the evidence submitted in the case.

CLIFFORD D. O'BRIEN,
HERMAN D. KENIN,
H. W. HAUGLAND,
Solicitors for Complainants.

Without waiving the foregoing motion for judgment notwithstanding the Memorandum Decision, but still insisting upon the same, but as an alternative motion, and in the event that the same be not granted, the complainants, and each of them, move the court for a [77] new trial and petition the court for a re-hearing, for the following causes materially affecting the substantial rights of the complainants.

1. That the court has failed to consider the effect of the abandonment by the parties herein of all contractual relations prior to the institution of this suit, and that the judgment announced is contrary to the law and the evidence in the case.

2. Insufficiency of the evidence to justify the decision.

CLIFFORD D. O'BRIEN,
HERMAN D. KENIN,
H. W. HAUGLAND,
Solicitors for Complainants.

Copy of the within motion received this 3rd day of Feb., 1939.

CLARK R. BELKNAP,
Atty. for Def.

[Endorsed]: Filed Feb. 3, 1939. [78]

In the United States District Court for the Western District of Washington, Northern Division.

No. 1162

GENE BUCK, President of A.S.C.A.P., etc.,
Plaintiff,

vs.

TRIANON COMPANY, INC.,
Defendant,

No. 1171

GENE BUCK, President of A.S.C.A.P., etc.,
Plaintiff,

vs.

JOHN G. LOCKHART, et ux.,
Defendant,

No. 1172

GENE BUCK, President of A.S.C.A.P., etc.,
Plaintiff,

vs.

TARRY INN, INC.,
Defendant.

RECORD OF HEARING.

Present H. W. Haugland, Attorney for plaintiffs and Clark R. Belknap as attorney for defendants. Mr. Belknap now presents arguments on motion to dismiss Case #1170 and Case #1164. Motion de-

nied. Mr. Belknap states cases will be appealed. (This is not to serve as Notice of Appeal). Findings of Fact and Conclusions of Law in Cause 1164 (Cleveland) submitted by Mr. Haugland. He agrees to attorney fees of $20.00 which is equivalent to docket fee and not in addition to docket fee. Findings of Fact and Conclusions of Law are now signed as interlined by the Court. Counsel agree to the interlineations. Decree is submitted and the same is returned to counsel to be rewritten. Findings of Fact and Conclusions of Law in Cause #1170 (Scribner) are to be rewritten to follow that in Cause 1164; decree to be rewritten also. Mr. Haugland addresses the Court in re Motion for New Trial in Cases 1162, 1171 and 1172, on grounds of inconsistent defenses. The Motion is denied, the Court holding that equity rules and practice provide that the defenses do not have to be consistent. The Court concludes the contracts were not cancelled in the manner that was available for their cancellation; Court not prepared to hold that there was an abandonment. Findings of Fact and Conclusions of Law and Decrees in Causes 1162, 1171 and 1172 to be presented by Mr. Belknap, and at the same time Mr. Belknap is to be prepared to give testimony [79] regarding attorneys' fees. Presentation of Findings, Conclusions, Decrees and testimony re attorneys' fees noted for Monday, February 20, 1939, at 10:00 A. M., at Tacoma.

Taken from Journal No. 26, page 503. [80]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Robbins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the decree and findings of fact and conclusions of law entered in this case on the 10th day of March, 1939, hereby appealing from the judgment of the District Court dismissing plaintiffs' cause of action, and granting defendant's costs and attorneys' fees.

Signed SWEENEY & HAUGLAND,
H. W. HAUGLAND,

Attorneys for Appellants Gene Buck as President of the American Society of Composers, Authors and Publishers, Robbins Music Corporation, Chappel & Co., and Popular Melodies, Inc.

[Endorsed]: Filed Apr. 20, 1939. [81]

Maryland Casualty Company
Baltimore

SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men By These Presents: That we, Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Rob-

bins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation, as Principals, and the Maryland Casualty Company, a corporation created and existing under the laws of the State of Maryland, with its principal office located in Baltimore, Maryland, as Surety, are held and firmly bound unto Trianon Company, Inc., a corporation, in the sum of Seven Hundred Fifty ($750.00) and no/100 Dollars in lawful money of the United States, to be paid to the said defendants, for which payment well and truly to be made we bind ourselves, and our heirs, executors and administrators, successors and assigns jointly and severally by these presents.

Signed and sealed this 20th day of April, 1939.

The Condition of this obligation is such, that whereas, said plaintiffs feeling aggrieved at the judgment entered in the above entitled court against said plaintiffs desire to appeal to the Circuit Court of Appeals for the 9th Circuit, from the decree and findings of fact and conclusions of law entered in this case on the 10th day of March, 1939, and from the judgment of the said District Court dismissing plaintiffs' cause of action and granting defendants costs and attorneys' fees.

Now Therefore, if the said principals shall satisfy in full any judgment entered on appeal together with costs, interest and damage for delay if for any reason the appeal is dismissed, or if the judgment is affirmed and shall satisfy in full such modification of the judgment and such costs, interest and dam-

ages [82] as the Appellate Court may adjudge and award, then this obligation to be null and void; otherwise to remain in full force and virtue.

GENE BUCK,
President of the American Society of Composers, Authors and Publishers.
ROBBINS MUSIC CORPORATION, a corp.
CHAPPEL & CO., INC., a corp.
POPULAR MELODIES, INC., a corp.
By H. W. HAUGLAND, Atty.

Attorneys for Appellants Gene Buck, President of the American Society of Composers, Authors and Publishers, and Robbins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation.

[Seal] MARYLAND CASUALTY COMPANY,
By WALTER E. MORRIS,
Attorney-in-Fact.

Above bond approved: April 20th, 1939.

EDWARD E. CUSHMAN,
Judge. [83]

State of Washington,
County of Pierce—ss.

On this 20th day of April, 1939, before me personally appeared Walter E. Morris to me known

to be the attorney in fact of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] (Sgd.) A. Van SCHRRMERROHM,
Notary Public in and for the State of Washington, residing at Tacoma.

My Commission expires Oct. 5th, 1942.

[Endorsed]: Filed Apr. 20, 1939. [84]

[Title of District Court and Cause.]

MOTION FOR CONSOLIDATION FOR PURPOSES OF APPEAL

Come now the plaintiffs herein, by their attorneys undersigned, and respectfully move the Court for an order consolidating for purposes of appeal with the above entitled cause, cause number 1171, being the case of Buck et alles vs. Lockhart, and cause number 1172, being the case of Buck et alles vs. Tarry Inn, Inc., and further respectfully moves that

all of said three cases be consolidated for purposes of appeal and that for appeal purposes the entries be all made in the instant cause, and that one record be brought up to the Circuit Court of Appeals under the said cause number 1162. This motion is based upon the records and files herein, and upon the affidavit of H. W. Haugland hereto attached.

SWEENEY & HAUGLAND,
(Sgd.) H. W. HAUGLAND,
Attorney for Plaintiffs.

State of Washington,
County of King—ss.

H. W. Haugland, being first duly sworn, on oath deposes and says: [85]

That he is one of the attorneys for the complainants, and makes this affidavit in support of a motion to consolidate the above designated three cases for purposes of appeal. Affiant states that at the time of the trial the three cases were tried at one and the same time. That it was stipulated and ordered in the trial that the three cases be consolidated for purposes of trial. That the proceedings were reported at the trial, and that there was but one transcript covering the proceedings in all the cases. That there was no segregation of testimony for each case, and that it would be an unnecessary duplication and repetition of material if three separate transcripts are prepared and presented to the Appellate Court. Affiant further states that the issues

are the same in each of the three cases, and that affiant believes that it is for the best interests of all parties that the said causes be consolidated for purposes of appeal.

H. W. HAUGLAND.

Subscribed and sworn to before me this 29th day of April, 1939.

JOSEPH A. SWEENEY,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed May 1, 1939. [86]

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME FOR FILING RECORD

Come now the plaintiffs above named and respectfully move the Court for an order extending the time for filing the record on appeal until July 15, 1939, for the reason that there is now pending in the Circuit Court of Appeals a motion to consolidate three cases for appeal, and the records can not be prepared until the said motion has been disposed of. Plaintiffs further move for an order extending the time for filing appellants' designation of contents of the record on appeal until a reasonable time after

the Circuit Court has ruled upon said motion for consolidation.

SWEENEY & HAUGLAND,
H. W. HAUGLAND,
Attorney for Plaintiffs.

To the defendants above named, and to Clark R. Belknap, attorney for defendant:

Please take notice that the undersigned will present the within motion to the Honorable Edward C. Cushman at Tacoma, Washington, on May ......, 1939, at 10:00 a. m.

SWEENEY & HAUGLAND,
Attorney for Plaintiffs.

[Endorsed]: Filed May 11, 1939. [87]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD

This matter coming regularly before the undersigned Judge of the District Court on the 11th day of May, 1939, on the motion of plaintiffs for an order extending the time for filing record in the Circuit Court of Appeals, and the Court being fully advised, does here and now

Order, Adjudge and Decree that the time for filing the record on appeal in the Circuit Court of Appeals be, and the same is hereby extended up to and including the 1st day of July, 1939.

Done at Tacoma, Wash., this 15th day of May, 1939.

EDWARD E. CUSHMAN,
Judge.

Presented by:
SWEENEY & HAUGLAND,
H. W. HAUGLAND,
Attorney for Plaintiffs.

Received copy of the within order May 13, 1939.

CLARK R. BELKNAP,
Attorney for Defendant.

[Endorsed]: Filed May 15, 1939. [88]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD

This matter coming regularly before the undersigned Judge of the District Court on the 27th day of June, 1939, on the motion of plaintiffs for an order extending the time for filing record in the Circuit Court of Appeals, and the Court being fully advised, does here and now

Order, Adjudge and Decree that the time for filing the record on appeal in the Circuit Court of Appeals be, and the same is hereby extended up to and including the 15th day of July, 1939.

Done In Open Court At Tacoma this 27th day of June, 1939.

EDWARD E. CUSHMAN,
Judge.

Presented by:
B. H. CAMPERSON,
Attorney for Plaintiff.

Approved:
CLARK R. BELKNAP,
Attorney for Defendant.

[Endorsed]: Filed Jun 27, 1939. [89]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Come now the appellants and hereby designate the contents of its record on appeal as follows:

1. Complaint
2. Pages 1 and 2 of the amended answer and cross complaint, and Paragraph XXXVIII of the affirmative matter in the said amended answer, (being found on page 16 thereof.)
3. Order striking affirmative defense
4. Reply
5. Stipulation as to the evidence
6. Plaintiffs' narrative statement, filed herewith, of all the testimony
7. Appellants' statement of points
8. Plaintiffs' exhibits Nos. 1 to 23, inclusive

9. Findings of fact, conclusions of law, and decree

10. Motion for judgment notwithstanding the memorandum decision, and in the alternative, motion for new trial or petition for rehearing

11. Order denying motion for new trial

12. Notice of appeal [90]

13. Bond on appeal

14. Motion to consolidate for purposes of appeal

15. Motion for extension of time for filing record

16. Order extending time for filing record

17. This designation

18. Defendants' Exhibits Nos. 1 and 2

19. Order extending time for filing record—filed 6-27-39.

SWEENEY & HAUGLAND,
H. W. HAUGLAND,
Attorneys for Plaintiffs.

Received copy of the within June 9, 1939.

CLARK R. BELKNAP,
Atty. for Def.

[Endorsed]: Filed Jun 15, 1939. [91]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washing-

ton, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 138, both inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Appeal fee (Sec. 5 of Act)..$ 5.00
Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return
31 folios @ 15c.. 4.65
Clerk's fees (Act Feb. 11, 1925) for comparing record:
302 folios @ 5c.. 15.10
Certificate of Clerk to Transcript of Record .50

Total $25.25

I further certify that the above cost for preparing and certifying record, amounting to $25.25, has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 8th day of July, 1939.

[Seal] ELMER DOVER,

Clerk.

United States District Court for the Western District of Washington.

By ELMO BELL,

Deputy.

[Endorsed]: No. 9231. United States Circuit Court of Appeals for the Ninth Circuit. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Robbins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation, Appellants, vs. Trianon Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 10, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9231

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPELL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Plaintiff,

vs.

TRIANON COMPANY, INC., a corporation,

Defendant.

DESIGNATION OF THE RECORD

To the Trianon Company, Inc., appellee, and to Clark R. Belknap, attorney for appellee.

You, and each of you, will hereby take notice that the appellants above named do hereby designate the entire contents of the record as being required for printing, and do hereby give notice to the Clerk of the Circuit Court that we respectfully request the Clerk to print the entire record for the transcript on appeal.

H. W. HAUGLAND,
HERMAN D. KENIN,
Attorneys for Appellants.

Received copy of the within this 17th day of July, 1939.

CLARK R. BELKNAP,
Atty for Appellee.

[Endorsed]: Filed Jul 20, 1939. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Come now the appellants above named, and each of them, and their counsel, H. W. Haugland, of Sweeney & Haugland, and Herman D. Kenin, and respectfully state that the points upon which they intend to rely in support of their claim that the District Court erred in granting judgment for the defendants in the three cases being appealed as one record, viz: Buck et alles vs. Trianon, Cause No. 1162, Buck et alles vs. Lockhart, Cause No. 1171, and Buck et alles vs. Tarry Inn, Cause No. 1170, and in refusing to grant judgment in each of the three cases for the plaintiffs, in accordance with the allegations of the bills of complaint, are as follows:

I.

Referring to the Trianon case, Cause No. 1162 in the District Court:

1. That the court erred in refusing to grant judgment of infringement for the complainants.

2. That the court erred in holding that the defendant, the Trianon, had a valid and subsisting

license from the American Society of Composers, Authors and Publishers on November 30, 1936, and further erred in holding that the said license had not been cancelled theretofore by the said Society.

3. That the court erred in permitting, over objection, the testimony of John Savage and Clark Belknap, defendant's witnesses, with respect to their alleged search of postoffice records.

4. That the court erred in failing to hold that the conduct of the parties prior to November 30, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting defendant an attorney's fee in the sum of $500, which sum was exorbitant.

6. That the court erred in granting judgment for the defendant.

II.

Referring to the Lockhart case, Cause No. 1171 in the District Court:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 10th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendants was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 10, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the defendants.

III.

Referring to the Tarry Inn case, Cause No. 1170 in the District Court:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 4th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendant was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 4, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the defendants.

HERMAN D. KENIN,
H. W. HAUGLAND,
Attorneys for Appellants.

Received a copy of the within this 17th day of July, 1939.

CLARK R. BELKNAP,
Atty for Appellees.

[Endorsed]: Filed July 20, 1939.

No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Appellants' Brief

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

H. W. HAUGLAND,
HERMAN D. KENIN,

Counsel for Appellants.

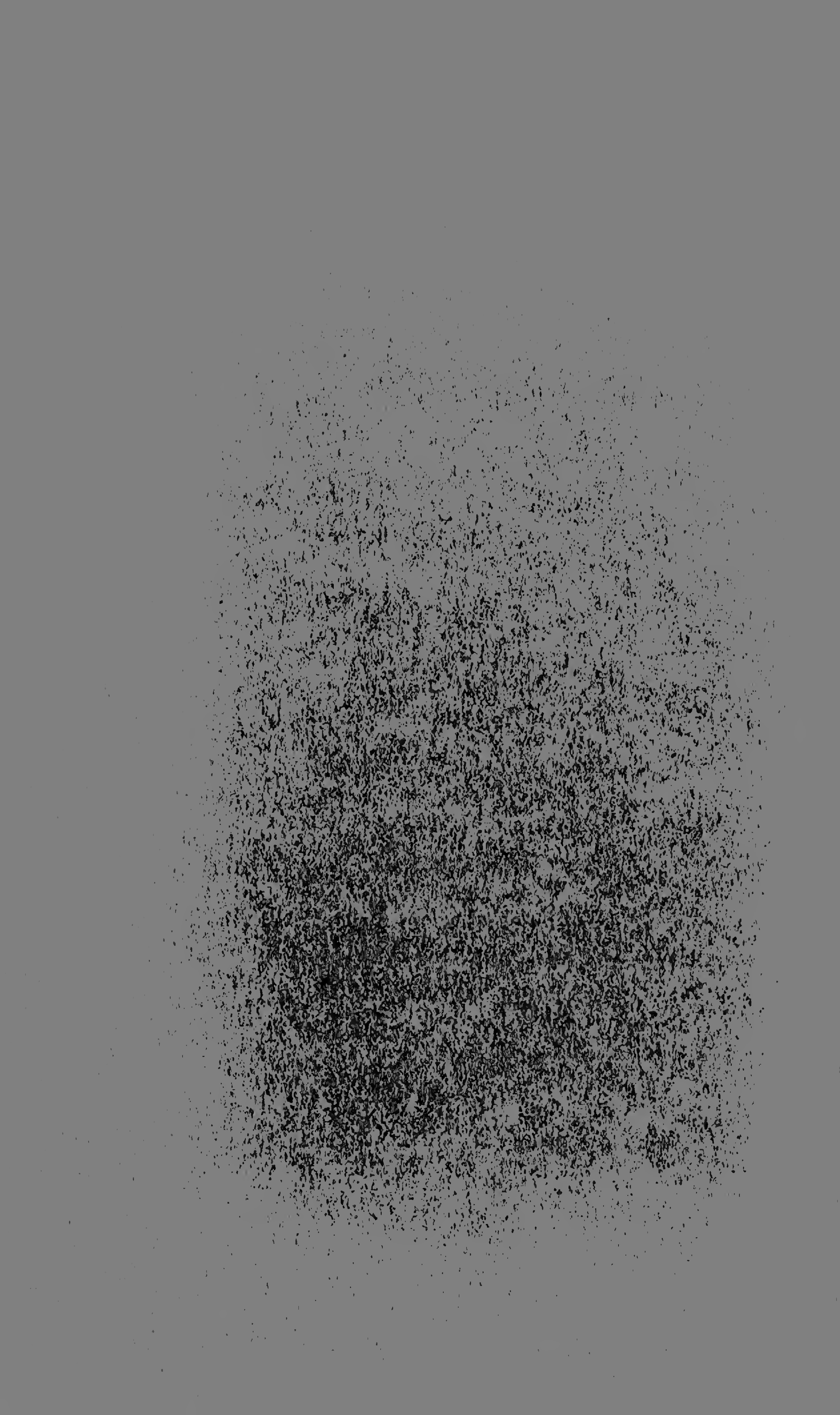
Arctic Building
Seattle, Washington

FILED

AUG 31 1939

PAUL P. O'BRIEN

THE IVY PRESS, SEATTLE



No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Appellants' Brief

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

H. W. HAUGLAND,
HERMAN D. KENIN,

Counsel for Appellants.

Arctic Building
Seattle, Washington

SUBJECT INDEX

	Page
OPINION BELOW	3
JURISDICTION	4
STATEMENT OF THE CASE	4
SPECIFICATION OF ERRORS	8
SUMMARY OF ARGUMENT	8
CONCLUSION	41

TABLE OF CASES

	Page
American Pastry Products Corp. vs. United Products Co., 39 Fed. (2nd) 181	39
American Streetcar Advertising Co. vs. Jones, 142 Fed. 974	30
Baker vs. School District (Neb. 1931), 233 N. W. 897	23
Burton vs. Bay State Gas Co., 188 Fed. 161	16
Computing Scale Co. vs. Barnard Co., 259 Fed. 250	31
Gerlach-Barklow vs. Morris and Bendien, 23 F. (2nd) 159	15
Hazeltine Research Corp. vs. Freed etc., 3 Fed. (2nd) 172, at 178	29

TABLE OF CASES—Cont.

Page

Hunt vs. Moline Plow Co., 52 Fed. 745 30

Kemmerer vs. Title and Trust Co. (Ore. 1918), 175 Pac. 865 27

Lathrop vs. Rice & Adams Corp., 17 Fed. Supp. 622 28

Marks vs. Leo Feist, Inc., 8 Fed. (2nd) 460 33

Parks vs. Gates, 84 App. Div. 534, 82 N. Y. S. 1070 .. 25

Reichert vs. Mulder, 235 N. W. 680 (Neb. 1931) 23

Rochart vs. City of Mount Vernon, 251 N. Y. S. 514 24

Russell, Burdsall & Ward vs. Excelsior Stove & Mfg. Co., 120 Ill. App. 23 23

Schellberg vs. Empringham, 36 Fed. (2nd) 991, page 995 16

Stodart vs. Mutual Film Corp., 249 Fed. 507 16

M. Witmark & Sons vs. Pastime Amusement Co., 278 Fed. 470 34

Restatement Law of Contracts, Chap. 13, p. 766 26

Corpus Juris, Vol. 13, p. 615 27

Ruling Case Law, Vol. 20, p. 1188 29

No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Appellants' Brief

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

OPINION BELOW.

The opinion of the court below in these cases is reported as *Buck et alles vs. Trianon Company,* 26 Fed. Supp. 96.

JURISDICTION.

These suits are for infringement of copyright, and seek injunctions restraining the defendants from publicly performing for purposes of profit musical selections copyrighted by the plaintiffs. Exclusive jurisdiction rests in the Federal courts under Section 34 of the Copyright Bill of 1909, Statutes at Large, Vol. 35, Part 1, pages 1075 to 1088 (U. S. Code, Title 28, Sec. 41). The plaintiffs' complaint is set out in the transcript, pages 2 to 23, inclusive, and particular attention is called to Paragraphs V, VI and VII of the complaint, found on pages 4 and 5 of the transcript. This appeal is from a judgment of the District Court dismissing the bill, and is brought under Sections 128 and 129 of the Judicial Code and the new rules of civil procedure.

STATEMENT OF CASE.

These three actions were brought by several owners of copyrighted musical compositions, for alleged infringements of the public performing rights therein granted the owners by the copyright laws. The relief requested was that defendants be enjoined from further performances. The several plaintiffs

were all members of the American Society of Composers, Authors and Publishers, and had assigned to that Society the right to protect the public performing rights in the musical selections involved in the actions. For purposes of brevity, we shall hereafter refer to the American Society of Composers, Authors and Publishers solely as the Society. Five suits were combined for trial. Plaintiffs recovered in two. In the three involved in this appeal, the District Court held there had been no infringement, because the defendants were operating under license agreements which had not been cancelled.

The final pleading on the part of the defendants consisted of a general denial, and a Paragraph XXXVIII of the affirmative defense, which alleged in effect that the defendants had been coerced (prior to June of 1935) into entering into a contract of license, and that said contract had never been cancelled. (Tr. 31-33.) This affirmative allegation was denied by the plaintiffs.

The ownership of the several songs involved was admitted by the defendants, and also that the complainants had taken all steps required for compliance with the copyright laws. This was by stipulation. (Tr. 36.) It was further admitted at the trial that

the defendants publicly performed these numbers for purposes of profit. (Tr. 50.)

The Trianon company had been granted a license June 1, 1927, and payments had been made thereon from time to time, the last of which was June 20, 1935, which paid the account to July 1, 1935. No payments were ever made or tendered by any of the defendants subsequent to that date. Plaintiffs' evidence tended to show a notice of cancellation (Plaintiffs' Exhibit No. 7) was mailed to the Trianon on May 27, 1935, cancelling the license as of July 1, 1935. (Tr. 112.) The defendant denied receiving this notice. Plaintiffs' evidence further tended to show that notices of cancellation had been sent on August 21, 1935, and received by the defendant Lockhart (Plaintiffs' Exhibit No. 18, Tr. 103), and defendant Tarry Inn, Inc. (Plaintiffs' Exhibit No. 20, Tr. 109.) This was the form letter, Plaintiffs' Exhibit No. 21. Neither of these two defendants denied receiving this notice.

The record discloses that a suit was instituted by the Attorney General of the State of Washington against the Society as defendant in the Superior Court of Thurston County in June of 1935. This charged violation of the anti-monopoly laws, and sought to restrain the Society from doing business

in the State. Upon the institution of this suit, the Society closed its office in the State of Washington and ceased to do business in the State. (Tr. 113-114.) A temporary receiver for the Society was appointed in that suit on August 13, 1935. The receiver was discharged and the suit dismissed on June 8, 1936. (Tr. 81.)

In the latter part of 1936, Mr. Herman Kenin, from Portland, Oregon, for plaintiffs, opened negotiations looking towards relicensing the defendants' establishments. He wrote letters directly to the several defendants, informing them that the Society was reorganizing its business in the State of Washington; sent them a license application for signing, so that a rate could be quoted. These letters brought an exchange of correspondence with the defendant Trianon, but no response from the other two defendants. The defendants were each notified that evidence had been taken of infringements and unless defendants' establishments were licensed, plaintiffs would have no alternative but to bring suit for infringement. The defendants still refusing to license their establishments, the instant suits were accordingly instituted in the early part of 1937. The cases were submitted to the court, and the decrees signed on the 10th day of March, 1939, dismissing the bills.

The court awarded costs and the following attorneys' fees to the defendants: to the Trianon company, the sum of $500; to the Lockharts, the sum of $750, and to the Tarry Inn, Inc., the sum of $400. Notice of appeal and bond were filed on April 20, 1939. (Tr. 151.) Time for filing the record in the Circuit Court was extended up to and including the 15th day of July, 1939. (Tr. 158.) Transcript was filed in the Circuit Court on the 10th day of July, 1939. (Tr. 162.)

SPECIFICATIONS OF ERRORS.

The court below erred in dismissing the bill of complaint; in refusing to grant plaintiffs judgment for infringement (Assignment 1); in holding that defendants had a valid and subsisting license agreement on the date of the alleged infringement (Assignment 2); in admitting over the objection certain testimony with respect to the contents of post office records (Assignment 3); in holding that there had not been complete abandonment of the contractual relations of the parties (Assignment 4); in allowing defendants an attorneys' fee in that the fee allowed was excessive (Assignment 5); and that the court erred in granting judgment for the defendant (Assignment 6; Tr. 141).

SUMMARY OF ARGUMENT.

1. The trial court held that there was no infringement because defendants were operating under a license. The evidence discloses that the defendants did not have a license agreement.

(a) The burden was on the defendants to sustain the contention of license. The defendants did not prove that they were operating under a valid and existing license in 1936.

(b) The court erred in permitting the defendants' witnesses to testify as to the contents of certain public records. The testimony violated the hearsay and best evidence rules.

(c) The plaintiffs proved the cancellation of preexisting licenses by a preponderance of the evidence. The cancellation notices had been sent, and the court should have found that they had been received.

2. If the court concludes that the license agreements were not cancelled by the plaintiffs, the evidence clearly sustains that both parties considered them abandoned. Each party performed acts inconsistent with the existence of any contractual relations, and in each instance these acts were concurred in by the other party.

3. The court allowed highly excessive attorneys' fees to the defendants. The suits were consolidated and all tried at one time. There were no complicated issues involved. Yet the court allowed combined fees in the three suits in which defendants recovered in the total sum of $1650. The expert witness was not qualified to testify. He based his estimate from having read the award of fees in five or six cases shown him by defendants' counsel.

Re Tarry Inn and Lockhart Cases.

In the *Lockhart* and *Tarry Inn* cases, there was no testimony offered by the defendants to prove that they were operating under a license agreement. The defendant Tarry Inn, Inc., offered no witnesses on its behalf. The receipt by defendants of cancellation notices was clearly shown. The defendants' acts likewise showed abandonment of any contractual relations.

I.

Re Trianon Case.

We will first discuss the *Trianon* case. All of the points and discussion in it are pertinent to the other two cases.

Point 1.

The Defendants Did Not Have a Valid and Subsisting License From Plaintiffs On November 30, 1936.

We respectfully suggest that the evidence conclusively shows that neither of the parties believed there were existing licenses during any portion of the year 1936. The plaintiffs sent a letter of cancellation to the Trianon Company on May 27, 1935. That letter cancelled all contractual relationships as of July 1, 1935. In June, 1935, the State suit was instituted against the plaintiffs, it being charged in that suit that the Society was a monopoly and therefore not able to do business in the State of Washington. This resulted in the voluntary closing of the Society's office in Seattle, a withdrawal from the State, and a complete cessation of any attempt to do business therein. A temporary receiver was appointed for the plaintiff in August of 1935, and this receivership continued until the final dismissal of that suit on June 8, 1936. The decree of dismissal in the State suit provides, Paragraph IX:

> "That any rights in the works of the members of the Society, under any assignment, license or permit heretofore made, issued or granted by the receiver are hereby declared to be, and shall

> be, of no further force, effect or validity beyond the first day of January, 1936." (Tr. 84.)

In the latter part of 1936 the plaintiffs opened negotiations looking towards a resumption of business in the State of Washington. On December 1, 1936, Mr. Kenin, for plaintiffs, from Portland, Ore., addressed a letter to the defendant Trianon Ball Room (Plaintiffs' Exhibit No. 8, Tr. 83), which in substance informed the defendant that it was infringing on plaintiffs' rights; that the plaintiff would be pleased to give it a license, so that the defendant could legally perform plaintiffs' copyrighted numbers; and enclosed a license application, suggesting in the alternative that, if it did wish to procure a license, then to desist from the use of plaintiffs' music.

Mr. Savage, president and owner of this defendant, acknowledged that letter on December 7, and stated (Plaintiffs' Exhibit No. 9, Tr. 64):

> "Your letter of December 1st received, and in reply will say it was my impression that the Society was a monopoly, and that the constitution of Washington is so strict against monopolies that it is not allowed to do business in the State."

We suggest that this, in and of itself, constitutes a direct denial of any existing license on the part of

the defendant, who states directly that the plaintiff can not do business in the State, and therefore is not able to give defendant a license.

Mr. Kenin answered Mr. Savage's letter on December 8, (Plaintiffs' Exhibit No. 10, Tr. 65) stating that he thought all the music users in Washington had been informed of the decision dismissing the Olympia suit; enclosed a copy of this decision, and informed Mr. Savage that the Society was proceeding to organize its business again in the State. He again urged Mr. Savage to fill out the license application, so that a rate could be quoted. Kenin sent a follow-up letter on December 15 (Plaintiffs' Exhibit No. 12, Tr. 93), and another on December 22 (Plaintiffs' Exhibit No. 11, Tr. 92). We quote from this last exhibit:

> "On December 1st registered notice was sent you of the fact that you were infringing upon copyrights belonging to the members of the American Society of Composers, Authors and Publishers. You were asked at that time to *submit an application for the use of these selections.* Three weeks have elapsed since that time, and to date no application has been received from you." (Italics ours.)

This letter was answered by Mr. Savage on December 28 (Plaintiffs' Exhibit No. 13, Tr. 67), in which Mr. Savage states, speaking of the music users:

"They still think the Washington constitution on monopolies is being violated, and are figuring on an entirely new method of protecting themselves.

"If the ASCAP concern wishes to do business in the State of Washington my opinion is they will have to take in their patrons in such a way as to overcome the 'monopoly' angle.

"For instance, ask a representative of the broadcasting stations, theaters, hotels and ballrooms to sit on a board with a representative of ASCAP for the purpose of fixing and agreeing upon the rates. This would take care of the monopoly side of the matter, and you would then be able to come into the State of Washington with clean hands and do business legitimately.

"In the meantime, *I do not believe it is the proper thing for me 'to make an application' against their wishes."* (Italics ours.)

This letter was answered by Mr. Kenin on January 4, 1937 (Plaintiffs' Exhibit No. 14, Tr. 68), in which he again told Mr. Savage of the infringements, and that the claim of monopoly was urged merely for the purpose of resisting license. He asked him to reconsider the matter, and gave as the only alternative the necessity for instituting a suit for infringement. The letter remaining unanswered, suit was accordingly instituted.

These letters clearly picture the situation between the parties. They unequivocally show a complete absence of any contention of a license. Neither party claimed a license. The defendants resisted any attempt on the part of plaintiffs to procure a license, and continually claimed that the plaintiffs could not do business in the State. This contention shows that defendants' claim at the time of the trial of a preexisting uncancelled license contract was purely an afterthought. It would be most inequitable to permit such a defense to stand.

A. The Defendants Failed to Sustain the Burden of Proof.

The plaintiffs, by the stipulation of facts, (Tr. 36), and by stipulation in open court (Tr. 50) established a *prima facie* case of infringement. The ownership of the copyrights; the taking of proper steps to procure such copyrights; and the public performance by defendants for purposes of profit were all admitted by the defendant. The burden of proving performance under license rests upon the defendant. This rule is stated in *Gerlach-Barklow vs. Morris and Bendien,* 23 F. (2nd) 159, as follows:

> "Where plaintiff, suing for infringement of copyright, *prima facie* proves the title, the burden

> of going forward with evidence shifts to defendant."

See also *Stodart vs. Mutual Film Corp.*, 249 Fed. 507, to the effect:

> "Defendant sued for infringement, asserting validity of its purchase of the play from a broker, defendant had burden of proving that issue."

In the case of *Burton vs. Bay State Gas Co.*, 188 Fed. 161, a receiver had been appointed for the corporation on July 1, 1903. A suit was brought on a contract, and the court held that it was not only the plaintiff's burden to prove that a contract existed, prior to the receivership, but also that the contractual relationship existed after the receivership. We quote, page 162:

> "Having established the existence of a contractual relation between the parties which was recognized by the gas company in its payment of April 15, 1903 * * * the burden is upon the appellant to show that this relation continued after July 1, 1903. The circuit court found that it was terminated by the appointment of a receiver."

We also refer to *Schellberg vs. Empringham*, 36 Fed. (2nd) 991, page 995:

> "To the extent that defendants' infringement is based upon a contention that it was licensed by Schellberg, *the burden of proof in establish-*

ing the same is upon the defendants." (Italics ours.)

In holding that defendants had not sustained the burden of proof, the court comments on the fact that the defendants' statements were not always consistent and attached great significance to the fact that the defendant did not immediately contend that he was licensed. We again quote, page 995:

> "That reliance should not be placed upon the claim of license seems clear, when consideration is given to the conduct of Empringham at the time he learned efforts would be made to hold him liable as an infringer. He then called * * * and asked that his infringement be condoned on the ground that he was a minister * * * *No claim was then made that his acts had been authorized by Schellberg."* (Italics ours.)

If the court in the above case attached significance to the defendant's failure to immediately claim a license, what significance should be placed upon the failure of the defendant Trianon to ever claim a license? The instant defendant went further and denied plaintiffs' right to give a license. We feel that the defendant has failed, not only to sustain the burden of proof, but has failed to offer any proof showing it was licensed at the time of the admitted performances.

B. The Court Erred In Permitting Defendants to Testify As To the Result of a Search of Certain Postoffice Records.

The court permitted Mr. Savage and Mr. Belknap to give certain testimony over objection. Mr. Savage had stated that, about a week before the hearing, he went to one of the Seattle postoffices where records are kept of registered letters. We quote the following proceedings (Tr. 128):

> "Q. In that record did you find any record of a letter purporting to be mailed by the American Society either to yourself individually (58) or to the Trianon Ball Room?
>
> Mr. Haugland: I object to that question * * * if he is attempting to testify what the records show I imagine the record would be the best evidence, not what he may have gathered from it. I object also on the grounds that he is not a competent witness to prove this. They could bring in the clerk who is in charge of the records.
>
> The Court: Objection overruled."

The witness thereupon testified (Tr. 129):

> "A. The postoffice department has no record of any such letter ever having been mailed through that office to me individually, or the Trianon. *I asked him specifically.*" (Italics ours.)

Mr. Belknap, over objection, corroborated this testimony. This is a clear violation of the hearsay and best evidence rules. 20 Am. Jur. 374, Section 418. All the other testimony and circumstances in this case are so conclusive in plaintiffs' favor that we can only believe that the District Court must have placed great credence in the above testimony, and attached great significance to it. His decision must have hinged upon this testimony, for he has held that no registered letter was actually mailed. We respectfully suggest that the erroneous admission of this testimony, in and of itself, constitutes ground for reversal of the decree and for granting of a new trial.

C. Plaintiffs Proved the Cancellation of the License.

The plaintiffs' testimony was direct and positive that Plaintiffs' Exhibit 7, the notice of cancellation, was written and mailed. Mr. Stanley (Tr. 112) stated that not only was this letter mailed to Mr. Savage, but subsequent to the letter:

> "On two occasions subsequent to May 27, 1935, Mr. Savage, manager of the Trianon Ball Room, called at my office for the purpose of dis-

> cussing what the rate for his new license would be, inasmuch as it was no longer feasible for the Society to continue his canceled license at the previous rate. I recall that there was an express difference of opinion by Mr. Savage as to what Mr. Savage thought was a rate he should pay in comparison to the schedule of fees set forth by the American Society. The result of the first visit brought no conclusions and the same applies to the second visit to my office. I also had conversations with Mr. Savage at his office in the Trianon Ball Room relative to the prior cancellation of his license and the issuance of a new one. He refused to take out the new license up until the time I left the Seattle office." (52.)

He stated these conversations were in June and July, 1935. (Tr. 114.) Mr. Savage did not deny that he had these conversations, and therefore they stand admitted. This court must take cognizance of this testimony, and, when weighed with the statements in Mr. Savage's letters, must overwhelmingly show the ultimate fact of cancellation. In addition, Mr. Savage stated that he kept no correspondence file with ASCAP, and that he threw away all letters. (Tr. 61.) We do not think much credence should be placed in this witness' statement that he did not receive the letter, where it was given more than three years after the letter was sent, and where he shows that he has kept none of the correspondence.

Mr. Kenin testified that, in his numerous conversations and negotiations with Mr. Savage during

1936, Mr. Savage never claimed to be operating under a right through a license. (Tr. 94.) Mr. Savage stated on his cross-examination that in his discussions he contended that:

> "If the company (ASCAP) was to arrange a different set-up so they could do business in the State of Washington without being tied up on the monopoly charges they could do business." (Tr. 62.)

Such conduct certainly proves anything but that the defendant was operating under a license agreement.

This attitude is further demonstrated by the affirmative matter pleaded by the defendants in Paragraph XXXVIII. It was alleged that the defendants were coerced into signing the original license agreement, and that at the time of such signing the defendant knew the plaintiff was an illegal combination, and that the defendants entered into the contract rather than to undergo the expense of litigation in contesting the claim at that time. The defendant, in effect, claims that he was operating at all times under a void or at least a voidable contract. His positive statements in his letter certainly show that he renounced any such contract. And he was of the same attitude at the trial, for on cross-examination he testified "I think yet they will have to come to something of that kind before they can get along

here." (Tr. 63.) We believe that, even placing upon plaintiffs the burden of proving no contract, that such burden has been met, and that the absence of any contractual relationship during any portion of 1936 has been established beyond any question of doubt.

Point 2.

The Original License Agreements Were, If Not Cancelled, Abandoned By the Parties.

Admitting, for argument, that plaintiffs failed to show cancellation, the evidence directly shows that there has been a complete abandonment of contractual relations. The plaintiff ceased to do business in the State. Mr. Stanley testified:

> "In order that there would be no question as to the Society's operations in the state of Washington after August 13, the Society instructed me to mail from Portland, Oregon, letters to all the licensed establishments in Washington that, in accordance with their licenses with the Society, said licenses were to be cancelled by the Society. Beyond the mailing of these letters of cancellation, I had, and exercised, no authority over the establishments licensed by the Society in the state of Washington, after August 13, 1935." (Tr. 113-114.)

The receivership proceedings intervened. The receivership was terminated on June 8, 1936. The plaintiff made numerous attempts to procure a license from the defendants. The defendant refused to take out a license. It made positive contentions that the plaintiff was a monopoly, and could not do business in the state.

The courts have universally applied the rule that contracts are terminated by abandonment if the parties perform acts inconsistent with the contract.

> "A contract is deemed to have been abandoned by a party where his letters indicate a clear purpose not to abide by its terms, and likewise a positive and unequivocal refusal to comply therewith." *Russell, Burdsall & Ward vs. Excelsior Stove & Mfg. Co.,* 120 Ill. App. 23.

In *Reichert vs. Mulder,* 235 N. W. 680, (Neb. 1931), the only evidence of abandonment of the contract was that the agreement had not been carried out, and that the plaintiff continued in his employment without protest. The court said, page 682:

> "A contract will be treated as abandoned where each party performs acts inconsistent with its existence, which in each instance are acquiesced in by the other."

In *Baker vs. School District* (Neb. 1931), 233 N. W. 897, the plaintiff brought suit to recover her

salary as a teacher. The evidence showed that she had married during the school term, whereupon the defendant's board sent her a letter suggesting that it "Would now be necessary to change teachers." Thereupon the plaintiff removed her things, surrendered the key to the school building, and returned to her home. Subsequently she brought suit to recover the salary. The court held that there had been an abandonment, stating, page 898:

> "Where a contract is entered into, and thereafter each party performs actions inconsistent with its existence, but in each instance the inconsistent act is acquiesced in by the other, such contract will be treated as abandoned by mutual consent."

In the case of *Rochart vs. City of Mount Vernon,* 251 N. Y. S. 514, the plaintiff had been employed as an architect for a city hall building, to be constructed if funds were available. A referendum election was held, and the building plan was defeated. The architect had made several speeches in favor of the program, and worked for its adoption. Upon its rejection, however, there was no formal cancellation of the contract. The city paid the architect a small sum of money, and this constituted the main point of evidence in the case. Several years later the original building program was carried out, with

another architect, whereupon the plaintiff sued for fees. The court states, page 518:

> "Having reached the conclusion that the plaintiff's contract referred to the building then in contemplation of the parties, and not to the building erected in 1927, I am forced to the conclusion that the contract was abandoned by mutual consent. Mutual assent to the abandonment of a contract, like mutual consent to the making, may be inferred. In *Parks vs. Gates,* 84 App. Div. 534, 82 N. Y. S. 1070, the court states the rule as follows:
>
> "After the scheme was abandoned, and had proven abortive by reason of existing conditions, the parties were remitted to their former condition, and no obligation would then exist by one toward the other respecting their subsequent conduct * * *
>
> "Such obligations ceased the moment the contract was abandoned by the parties thereto, and thenceforth they stood toward each other as strangers."

The above cases are very pertinent to the instant case. Certainly with the appointment of a receiver, and the cessation of business in the State by plaintiffs, there had been an abandonment of the scheme. The contentions made by the defendant, upon plaintiffs' attempts for new licenses, clearly shows that the defendants acquiesced in the abandonment.

Abandonment in this case can also be found by inference from the conduct of the parties. The de-

fendants made no tender of fees. They did nothing which would recognize the existence of a license. They refused to sign license applications not because they had existing licenses, but they contended that plaintiffs could not do business in the State, and could not, therefore, legally collect license fees. On the other hand, the plaintiffs sent out notices of cancellation. They made no attempt to collect license fees until late in 1936, when they commenced to reorganize their business. Had plaintiffs considered there were outstanding licenses, they would have sent out statements, and attempted to collect fees, since that was their only desire. In Restatement of the Law of Contracts, Chap. 13, Section 406, page 766, we find, Subsection (b):

> "The agreement to rescind need not be expressed in words. Mutual assent to abandoning a contract, like mutual assent to form one, may be manifested in other ways than by words. Therefore, if either party even wrongfully expresses a wish or intention to abandon performance of the contract, and the other party fails to object, there may be sometimes circumstances justifying the inference that he assents. If so, there is recission by mutual assent; * * * "

The evidence goes further, and shows that the defendant not only abandoned, but repudiated any contract. Defendant in positive and direct language unequivocally refused to be licensed; he indicated

he was not bound. The rule is stated in 13 C. J. 615, Section 668,

> "* * * in determining whether there has been a repudiation of a contract by one of the parties, so as to warrant the other in rescinding, the test is whether the acts and conduct of the party evidences an intention to no longer be bound."

In *Kemmerer vs. Title and Trust Co.* (Ore. 1918), 175 Pac. 865, plaintiff sought to recover certain payments made on a real estate contract. The evidence disclosed that after making several payments, the plaintiff had written, with respect to further payments, that

> "I see, however, that I will be unable to do so, as I have some unlooked for bills and * * * will have to let it go."

The defendants, upon receipt of the letter, marked the original contract "cancelled," and subsequently sold the property to other parties. The court says, page 868:

> "The plaintiff abandoned the contract. 38 Cyc. 1353. The letter written by Kemmerer on February 7, 1919, was equivalent to saying to the Title & Trust Co. 'I abandon the contract, and I waive and surrender whatever rights I have to insist on additional time, or notice of your intention to terminate the contract; notice to me would be an idle ceremony; and, since I do not require notice, you may terminate the contract

without previous notice.' The law does not ordinarily require the doing of a vain thing.

> "A renunciation of the agreement by declarations or inconsistent conduct before the time of performance may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. *It may destroy all capacity of the party so disallowing its obligation to exert rights under it afterwards, after the party has acted on such disavowal.*"
>
> 12 Am. Jur. 959, Section 382.

By its letters the defendant has disavowed any contractual relationship. It has said "You can't do business in this State." "You are a monopoly." "You will have to let us fix the fees." They have thrown off any protection of a license and stand admittedly as infringers.

> "The licensor is not to be left in a doubtful or uncertain position. He must not be exposed to the double danger of being defeated in a suit for infringement by a plea of license never effectively or authoritatively renounced, or if he sues for royalties, of being beaten because there was merely an infringement, if anything." *Lathrop vs. Rice & Adams Corp.,* 17 Fed. Supp. 622.

The defendant should be estopped to claim a license. In response to the request for a license or for cessation of performance the defendant boldly

states that the plaintiff cannot do business in the State, and "In the meantime, I do not believe it is the proper thing for me to 'make an application.' "

> "A licensor is entitled to assume that his licensee remains such until the latter, by clear, definite and unequivocal notice, emanating from lawful and competent authority, throws off the protection of the license and stands admittedly as an infringer." 20 R. C. L. 1188.

We quote from *Hazeltine Research Corp. vs. Freed etc.,* 3 Fed. (2nd) 172, at 178:

> "However it is very plain, it seems to me, that where circumstances show that it is not simply a question of collecting compensation, but that the non-payment is but an overt act, evidencing with other facts an intention not to duly practice the invention, then the real purpose of the license agreement has been repudiated, and the inventor should have it back from the other party, who either does not consider it of value, or who seeks to pick the brain of the inventor without deeming itself bound to pay for what has been taken from him by reason of the contract."

Conversely, let us ask what chance would the plaintiffs have had if this were a suit to collect royalties? It had sent notices of cancellation. The receivership had intervened. The receiver had been discharged with an order terminating any licenses expiring during his operation, and terminating any which he may have continued, with the effective termination date

December 31, 1935. We believe no court would have granted recovery if the instant suit had been one for royalties.

In *Hunt vs. Moline Plow Co.,* 52 Fed. 745, the plaintiff patentor had licensed defendant to use a patented plow, with the privilege of cancellation. The defendant notified plaintiff that they could not proceed with the manufacture, and marked the license cancelled. About a year later plaintiff wrote defendant in substance that

> "If he heard nothing further from the defendants by the 11th ult. he would license the patent to another company."

The defendants did not answer or object. Thereafter, plaintiff brought a suit for royalties, which the court dismissed as follows, page 748:

> "It is not necessary when acting under this clause (cancellation) that the parties should actually have manually surrendered and cancelled this contract. If the conduct of the defendant is such as to manifest a clear and unequivocal intention so to do. The surrender of the contract is as effectually accomplished by notice to the plaintiff that the defendant would not further proceed under the contract as if the parties had solemnly come together and either cancelled or torn the contract in pieces. * * * "

In *American Streetcar Advertising Co. vs. Jones,* 142 Fed. 974, the Circuit Court reversed the lower

court and ordered the bill dismissed. The records showed that there had been a license, but the plaintiff had made requests for a higher rate. We set forth the language, page 977:

> "Complainant's letter, therefore, of January 4, ordered defendant to 'discontinue building such racks in cars without authority by me to do so, under penalty of the law,' coupled with the statement that, if he should 'conclude to allow said racks built in cars, my price would be $5 per car' was in entire accord with the understanding of both parties, either that there had been no contract for a future license, or that, even if any such license might have been claimed, it was one terminable at will of complainant's assignor, and the statements in his letter were acquiesced in by defendants as constituting a complete rejection of whatever rights or license they might otherwise have claimed. The contract, if any, was therefore rescinded by mutual consent."

Similarly, in *Computing Scale Co. vs. Barnard Co.,* 259 Fed. 250, the licensor brought suit to recover royalties. The licensee had written

> "We have but to refer you to our letter of June 16, 1908, where we call attention, specifically, to fatal defects in the Barnard invention, and these not being worked out, consider the entire matter at an end."

Syllabus Two of the case is as follows:

> "If the owner of a patent knew that his licensee deemed the contract between them

> ended not later than the end of a royalty period to which his suit for royalties was directed, and realized that a demand by him for royalties would bring a cancellation by his licensee under another clause of the contract, and nevertheless kept silent for the longest period permitted under the statute of limitations, he would be estopped to insist that there had been no effectual cancellation by the licensee."

In the instant case, the defendant stated that the plaintiffs could not collect a license fee; that they could not do business in the state. They refused to discuss a new license, and relegated the license application to the wastebasket. Had there been any merit to the defendant's contention that it was licensed, it would have tendered fees under its claim that its preexisting license had not been cancelled. This was not done, and by its conduct this defendant has certainly shown it was not licensed at any time in 1936.

Point 3.

The Attorneys' Fees Allowed To the Defendants Are Excessive.

The trial court, upon dismissal of the plaintiffs' bills, allowed the defendant judgment for costs and attorneys' fees. These fees were as follows: *Trianon*

case, $500; *Lockhart* case, $750, and in the *Tarry Inn* case, $400. These fees are highly excessive and tend to show bias on the part of the court.

The allowance of attorneys' fees and the amount is within the discretion of the court, but such discretion is not absolute, and the court's judgment as to the amount allowed is subject to review by the Circuit Court.

Marks vs. Leo. Feist, Inc., 8 Fed. (2nd) 460.

At the hearing of plaintiffs' motion for new trial, on February 13, 1939, the court indicated that it would allow the defendants an attorneys' fee of $100 in each case. (Tr. 131.) Thereafter, on the 10th day of March, 1939, at the presentation of the findings and decrees for signing, the defendant produced as an expert witness on the question of fees, Mr. Bert C. Ross, a Seattle attorney. At the conclusion of his testimony, the court announced that he would allow the fees as above indicated.

Mr. Ross testified that he had not examined the court files. He saw only some pleadings in Mr. Belknap's files. (Tr. 133.) His testimony showed that he believed the litigation involved a particular knowledge of copyright law. (Tr. 134.) This is clearly negatived by the record. He further stated

that he had never tried a copyright case. He had, therefore, never made a charge, or participated in fixing fees in a copyright infringement case. His opinion was based on some allowances of fees that had been made in five or six decisions of the Federal courts, shown him by Mr. Belknap. (Tr. 134.) As a matter of fact, he said,

> "I testified that I had read five or six cases, and these were called to my attention by Mr. Belknap, and were the only ones that I have read, and *I have given great weight to those cases.*" (Tr. 139.)

We presume defendants' counsel could have found additional cases where large fees were allowed, and that he was certain to show the witness only cases where large fees were allowed. The point is that it is improper for Mr. Ross to base his estimate on such a foundation. It shows no independent study and certainly no qualification. We can cite any number of cases similar to the instant case where the fees allowed would nowhere approximate these. Illustrative is *M. Witmark & Sons vs. Pastime Amusement Co.,* 278 Fed. 470, where there were more defenses and the action was decidedly more complicated than the instant case; the fee allowed was but $100.

The witness fixed the value of the services at $100 per each count in each case, and had no explanation

for this except that the amount recoverable would be greater for each additional count. It is apparent that there is nothing in this record that justifies a fixing of fee on the number of counts involved, for there was not additional work due to the fact of additional counts. The sole issue was whether or not the performances were under a license. Mr. Ross further specifically said he did not consider himself an expert. (Tr. 136.)

We submit that, even though the judgment should stand, the defendants are not entitled to an attorneys' fee. The defendants' conduct induced the suits. They disavowed any right to a license. They resisted and refused to sign license applications. Surely this conduct will not be commended by the court.

Since the taking of this appeal, we have ascertained that, at the time he was a witness, Mr. Ross was also an attorney in the employ of the defendants. This fact was not called to the attention of the trial court, and we have attempted to bring it to the attention of this court by way of an affidavit filed in this court, a copy of which is appended to this brief and marked Exhibit A. This court may refuse to consider this affidavit, but we submit it solely because it might tend to show that the witness had reason to be prejudiced.

II.

Re Lockhart and Tarry Inn Cases.

In the *Lockhart* and *Tarry Inn* cases, notices of cancellation were sent to each defendant from Portland, Oregon, August 21, 1935, which was after the plaintiffs had ceased to do business in Washington. The defendants undeniably received these cancellation notices. These cases differ from the *Trianon* case only in so far as counsel will contend that the cancellation notice was sent after the appointment of a receiver, and therefore without authority.

The defendant Lockhart took the stand. His testimony is recorded at page 96 of the Transcript. He does not state that he is possessed of a license. He does not state that the original license was not cancelled. His testimony can have no weight, for he states he kept no correspondence file; he threw away all letters, and he could not even recall signing for a registered letter, despite the fact that he admitted the postmaster's return receipt attached to Plaintiffs' Exhibit No. 17 bore his signature. His testimony is all the evidence that was submitted in the *Lockhart* case.

No witness was called for the defendant Tarry Inn, and there was no testimony or evidence at all

submitted on behalf of that defendant, excepting the fact that at one time this defendant had been licensed. There is, therefore, not one scintilla of evidence rebutting the plaintiffs' showing of cancellation of that pre-existing license.

Plaintiffs' testimony showed that neither of these defendants made payment or tender of any fees during any of the time here involved. The plaintiffs' witness, Mr. Meriwether, testified that he called upon Mr. Lockhart prior to the institution of the suit, and was referred by him to Mr. Jeffery Heiman, his attorney. Mr. Heiman was also representing Tarry Inn, and was one of the attorneys of record at the trial of these cases. (See Tr. 35—endorsement of attorneys.) Attempts were made to negotiate license agreements for these defendants with Mr. Heiman. (Tr. 120.) Mr. Heiman did not contend that these defendants were licensed. He attempted to procure a license agreement to date from January 1, 1937. The plaintiffs insisted that the agreement should date from January 1, 1936. This testimony stands undisputed. There was no question of rates involved. The only dispute was, the defendants sought to escape payment for their admitted use of these songs during all of the year 1936.

The plaintiffs' testimony is clear and undisputed that infringement notices were sent by registered mail, and these were received by each defendant. The defendants ignored these infringement notices. They did not immediately or ever contend that they were licensed, and by such conduct stand charged as in the *Empringham* case, *supra*. Had these defendants desired to avoid the charge of infringement, they would only have had to sign the license applications submitted to them. They should be estopped from pretending that they were performing under a claim of license.

An examination of the license (Plaintiffs' Exhibit No. 19, Tr. 105) shows that these license agreements were all on a similar form, and the term ran from year to year. The defendants have not shown that these license agreements were adopted by the receiver, and therefore they must be held terminated by operation of law. It is a fundamental rule that in receivership, the contracts are held abandoned unless adopted by the receiver. In addition, the receiver must procure the approval of the court for any adoption or renewal of the licenses. The evidence goes further, in this case, and shows that the court, in the receivership, terminated all license agreements with the order of dismissal, as hereinbefore recited.

There is one additional feature in the *Tarry Inn* case. The license agreement shows that the defendant Tarry Inn was licensed to operate the Lyons Music Hall "to be in effect only as long as the present policy is maintained—namely, *not more than three musicians.*" (Tr. 108.) The testimony was that the defendant Tarry Inn was operating a place called the Spider Web, and that four musicians were regularly employed in said establishment. (Tr. 110.) Such use was clearly outside the scope of the license agreement, and establishes, in and of itself, infringement. Any use beyond the license claimed is held to be infringement.

Rogers on Patents, Vol. 2, page 1246.

In the case of *American Pastry Products Corp. vs. United Products Co.,* 39 Fed. (2nd) 181, the court said in referring to the matter of selling outside the licensed territory, at page 183:

> "As to this, on the face of the license it was never authorized; and the license is therefore no defense to the violation of the injunction which it involved, unless it is made so by the defendants' agreement not to sell except as therein authorized. * * * I do not think that the tort is merged in a negative covenant of this character. If B has no right to cross A's land but does so, he is not the less a trespasser because of the fact that he promised A upon good consideration to refrain from trespassing."

The defendant Tarry Inn had ceased its operation at the Lyons Music Hall. It had opened an operation known as the Spider Web, with a new policy, and without bothering or inquiring about plaintiffs' rights.

All of the discussion regarding cancellation and abandonment hereinbefore set forth applies to the acts and conduct of these defendants. In addition, there is no testimony on the part of these defendants to rebut the proof of cancellation which plaintiffs submitted. With such a record before us, we believe the court erred in holding that there was no infringement.

CONCLUSION.

We urge that the defendants stand as admitted infringers. The plaintiffs cancelled, or at least considered they had cancelled the licenses. The defendants have thrown off, by affirmative act and negative conduct, the protection of any pre-existing license. The defendants, if successful in the instant suit, are making a sham out of ordinary business dealings. A copyright owner should not be exposed to the danger of being denied in his attempts to negotiate a license, and then, upon suit for infringement, of being beaten by a plea of license, all the while the defendants make bold and unrestrained use of the plaintiffs' property.

Respectfully submitted,

H. W. HAUGLAND,
HERMAN D. KENIN.

Exhibit A

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation, *Appellants,* *vs.* TRIANON COMPANY, INC., a corporation, *Appellee.*	No. 9231 AFFIDAVIT OF H. W. HAUGLAND

STATE OF WASHINGTON }
COUNTY OF KING } ss.

H. W. HAUGLAND, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled case. That since the appeal of this case has been taken, affiant has learned that Bert C. Ross, one of the defendant's witnesses, was at the time of the hearing, when he testified, and still is, an attorney in the employ of the defendant Trianon Company, Inc., and John Savage. Affiant states that the said Bert C. Ross is a member of the firm of Patterson & Ross, and that the said firm are attorneys of record in the following cases now pending in the Superior

Court of King County, Washington: Robert Carmody vs. Trianon Company and John Savage et alles, Cause No. 311439, and the case of Pacific National Bank vs. John Savage, Trianon Company, et alles, Cause No. 305630.

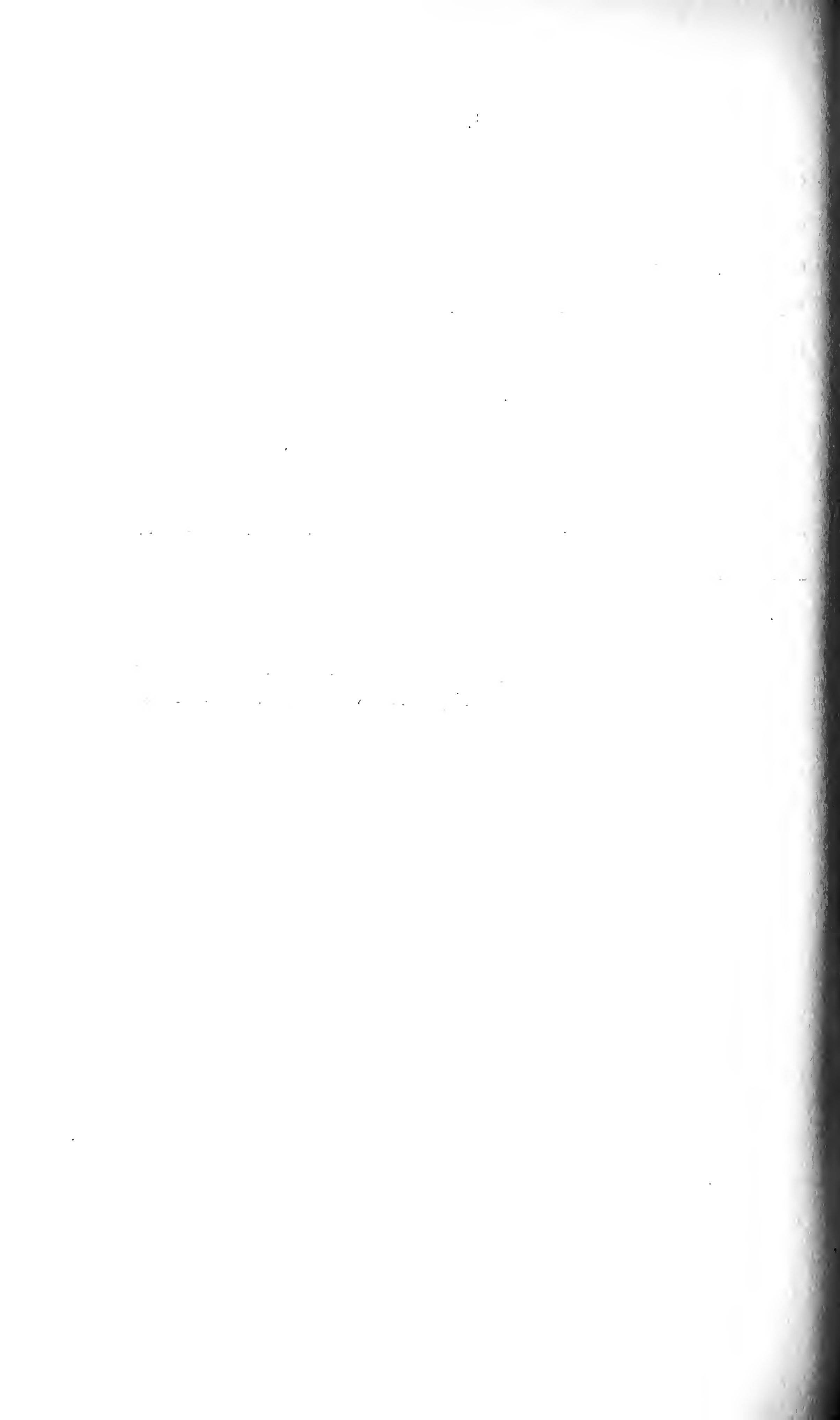
Further affiant saith not.

H. W. HAUGLAND.

SUBSCRIBED and SWORN To before me this 25 day of August, 1939.

E. BARRETT

Notary Public in and for the State of Washington, residing at Seattle.



No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

Appellees' Brief

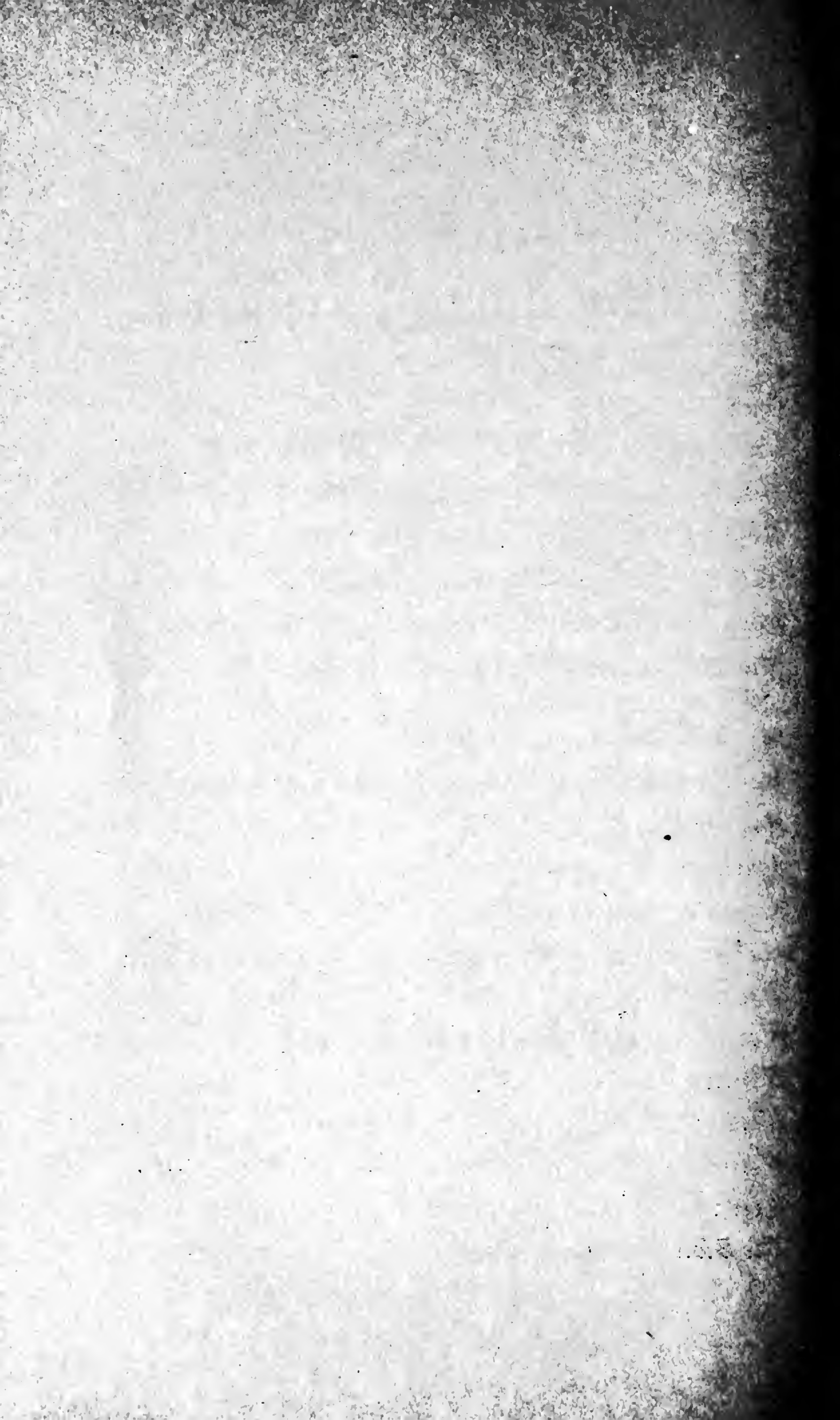
CLARK R. BELKNAP,
Counsel for Appellees.

601 County-City Building
Seattle, Washington

FILED

OCT 2 - 1939

PAUL P. O'BRIEN



SUBJECT INDEX

Page

PREFACE 1
ARGUMENT 2
ABANDONMENT 17
PLAINTIFFS' CASES 30-31-32-33-34-35-36-37
BURDEN OF PROOF 40
COUNSEL FEES 41-42-43
CONCLUSION 44-45-46-47

TABLE OF CASES

Page

Bradley vs. Blandin, 110 At. 314 22

Buck vs. Jewell La Salle, 32 Fed. (2nd) 366 43

Miller vs. Wheeler, 54 Wash. 429 24

Fiest vs. Dreamland Ballroom, 36 Fed. (2nd) 354 43

Missisippi Central R. Co. vs. Aultman, 296 U. S., 537 46

Moon vs. Rollins, 36 Calif. 333 22

Remick vs. General Electric, 16 Fed. (2nd) 829 44

Roe vs. Kansas, 278 U. S. 191 46

Schellberg vs Empringham, 36 Fed. (2nd) 991 31-44

Slaker vs. O'Connor, 278 U. S. 188 46

Stodard vs. Mutual Film Corp., 249 Fed. 507 30-44

Town of Basic City vs. Bell, 76 S. E. 336 22

Waterson et al vs. Tollefson, 253 Fed. 859 44

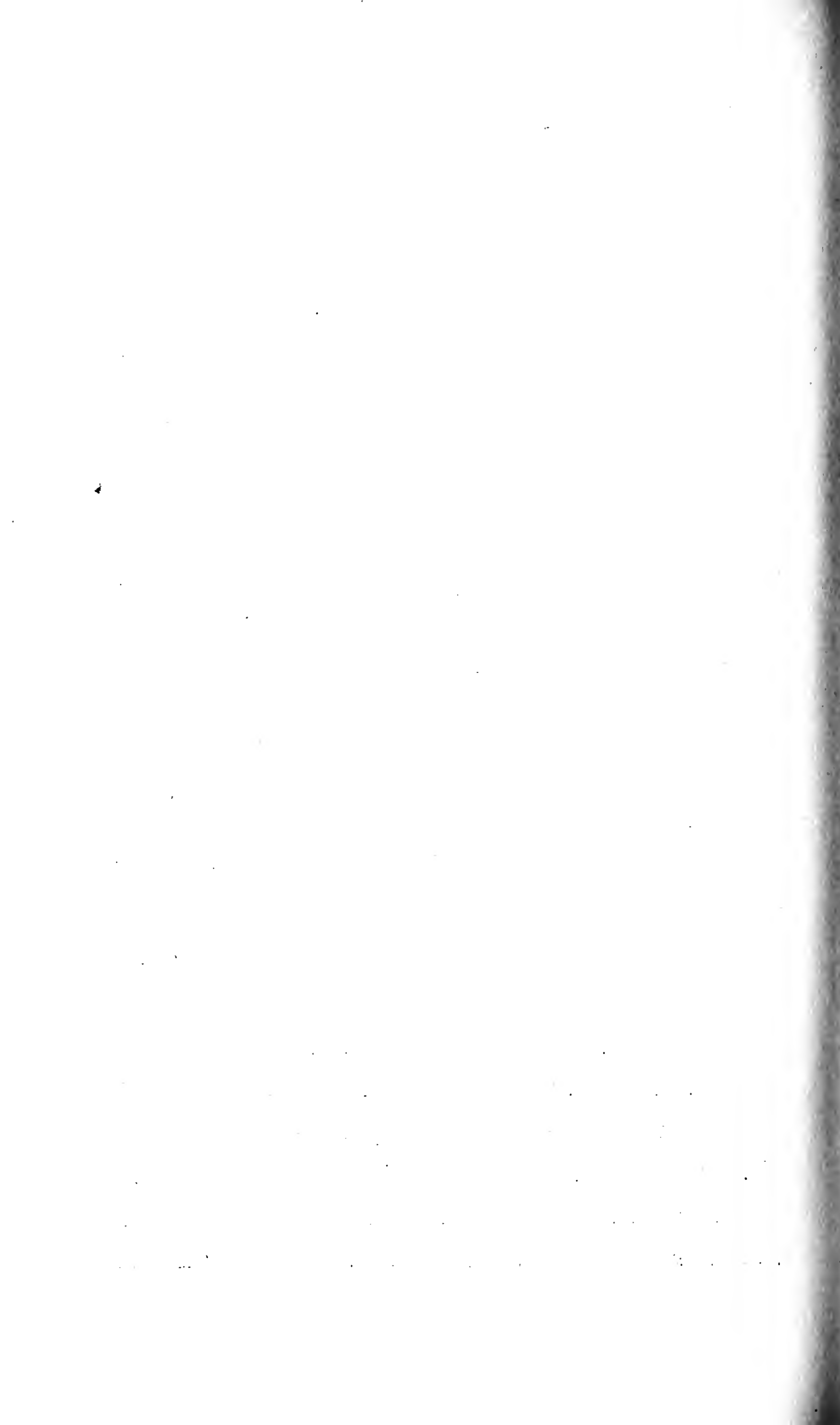
Winston vs. Stover, 299 U. S. 508 46

Witmark vs. Calloway, 22 Fed. (2nd) 412 43

Witmark vs. Pastime Theatre, 298 Fed. 470 43

American Jurisprudence, Vol. 1, p. 12, No. 17 21

The Bible .... 8 and 13



No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

Appellees' Brief

PREFACE

We will refer to appellants as plaintiffs, and appellees as defendants. The plaintiffs are here seeking judgments against the defendants calling for maximum damages of $100,000.00 or minimum damages of $5,000.00, plus costs and attorneys' fees, because the

defendants rendered in their places of business twenty pieces of music. Before the court lays such a heavy hand upon these little defendants, the proof should be very clear that plaintiffs are entitled to the judgments sought. Defendants Lockhart and wife operate a little eating place out from Seattle. We presume the court is well aware that it will take a great many thousand sandwiches to pay such heavy judgments. We are not seeking the court's sympathy; merely showing the importance of these cases to the defendants. We insist the plaintiffs must prove their causes before they are entitled to such severe judgments; we propose to show they are not entitled to any judgments.

ARGUMENT

Plaintiffs have made such a plain statement of the cases and the issues involved, with only a few errors, which will later be pointed out, that we will not make any detailed statement.

There are but two questions of importance to be considered:

1. Were the license contracts issued by the plaintiffs to the defendants in effect on the dates of the alleged infringments?

2. Were the counsel fees allowed by the court reasonable?

Question No. 1.

Plaintiffs themselves offered in evidence the license contracts issued to the Trianon and Tarry Inn. (Tr. 85 & 105.) They admitted a similar license had been issued to Lockhart. (Tr. 101.) The general terms of all three contracts are the same. Plaintiffs denied in their reply that such licenses had ever been issued, still they introduced the contracts in evidence. An unusual performance at the best. Of course, plaintiffs are bound by their own evidence; that is basic. Suppose we examine one of the contracts. (Pls' Ex. 19, Tr. 105.) It will be noted that the contracts state the reasons for and the manner of cancellation; namely—

Par. 6 says that upon any breach or default, the Society may, upon notice, cancel the contract. Par. 7 says: "the same shall be renewed—from year to year, unless either party—shall give notice in writing by registered mail, etc." Those are plain words; not hard to understand. Plaintiffs drew the contracts; they must have known their terms. The Trianon license had been thus renewed for many years, since July, 1927.

It will be noted that *Non Payment of Fees Does Not Cancel the Contract;* only furnishes ground for cancellation. The contracts clearly reveal that there is but *one way of disposing of them, by written notice.*

And that is a fair and easy method. If a licensee defaulted in his payments, the Society could do one of two things; (a) sue for sums due under the contract, or (b) cancel the contract and, if infringements were committed, sue thereon. Apparently they chose the latter course in all of these three cases, *only they failed to take the necessary first step—they did not cancel the licenses,* as we shall presently point out. In drawing the contracts, plaintiffs could easily have provided that non-payment would work a cancellation; however, they made no such a provision. We must take the contracts as made.

It is clear that plaintiffs recognized the contracts must first be cancelled before these suits could be brought, for at the trial they went to great lengths in attempts to show that they had complied with the terms of the contracts, by introducing the letters of cancellation, (Pls' Ex. 7, Tr. 71; Ex. 21, Tr. 115, together with the postal receipts).

Here is a good place to correct a number of errors found in plaintiffs' brief. On page 4, plaintiffs say the relief sought is an injunction. They forgot to mention the trifling matter of judgments of from $5,000.00 to $100,000.00, plus costs and counsel fees. That may be only a trifling sum to plaintiffs but not to defendants. They say on several pages that plain-

tiffs offered evidence that a letter (Tr. 71) was sent the Trianon May 27, 1935. There isn't a word of testimony to be found anywhere in the record to the effect that such a letter was ever sent, by mail or otherwise. Mr. Kenin did not mail it. Mr. Stanley, then in charge of the office, says he did not mail it. The nearest they came to presenting any evidence the letter was ever mailed is in Stanley's deposition (Tr. 112). He says: "and directed it to be mailed by registered mail." So he did not mail it. At best he only directed it to be mailed. Then he made a most unbelievable statement. On page 113 of the Tr., he says he *confirmed the registration the next day by calling at the post office.* In the deposition, which is not set out in full in the Tr., he says: "I went to the post office the next day and there found it had been registered." That statement on its face looks bad; business men do not go to the post office the next day and check the records. But more of that later.

Mr. Savage denied ever having received the letter. (Tr. 62.) No return card from the post office was offered in evidence In fact no proof of any kind was offered that it had been mailed. Mr. Savage, Mr. Lyons, and Mr. Belknap went to the post office and searched the books kept by the registered mail department to see if there was any record of the

letter having been mailed either the 27th, 28th, or 29th of May, 1935, and found no record of a letter from the Society or Mr. Stanley addressed either to the Trianon or to Mr. Savage, its manager, (Tr. 128). It would appear that Mr. Stanley deliberately falsified; he couldn't have been only mistaken.

Counsel says that the testimony of Mr. Savage et al was not competent on this question. Do they contend that all the employees of the post office should have been in court, bringing with them all their records to show what they did not contain? Of course, a deed must be offered to show a conveyance of land. But if land is not conveyed, must one offer a deed in evidence that never existed? What deed? Obviously one cannot produce a deed that never existed, and it is equally obvious that one cannot produce records of a letter having been registered, if there are no such records. All they could do was to search for such records; none could be found.

But in denying credence to defendants' testimony, plaintiffs are destroying their own evidence. The only proof of the letter being mailed was Stanley's "checked the post office records." Instead of Stanley's oral statement why did not plaintiffs produce the post office records? Certainly if it is fair for plaintiffs to rely upon oral testimony *to prove the contents* of a

record, it is more than fair to accept defendants' testimony that no records exist.

On page 8 of their brief (Assignment of errors, 3) counsel say the court erred in admittting testimony as to the "contents" of the record. No proof was offered as to the "contents" of any record. Defendants merely testified that no such records existed. On page 19 of their brief, they say the court must have placed great credence upon the testimony of Savage and Belknap. No doubt he did. Whom else was he to believe? Certainly the court could not be expected to believe Stanley. Of course, counsel must stand by their clients but we seriously doubt if even they believe that Stanley went to the post office the next day, etc. But in any event, if the court erred in admitting defenants' testimony it also erred in admitting plaintiffs' testimony. (Stanley's deposition.)

We need not cite authorities on this principle. It sufficient to say that plaintiffs should remember they entered a court of equity. "He who seeks equity, must do equity," applies to all litigants, even to plaintiffs. That is an ancient doctrine, only a fairly modern expression of the Golden Rule, which probably was in effect when the shepherd kings ruled Israel. In the Sermon on the Mount, Christ said:

"All things therefore whatsoever ye would that men should do unto you, even so do ye also unto them; *for this is the law and the prophets.*" Matthew 7-12. (Italics ours.)

Doubtless even at that date this was only an enunciation of a long established principle. Otherwise, *"for this is the law and the prohpets"* would be meaningless.

It follows then that if counsel are going to deny admission of defendants' oral testimony they must also elminate Stanley's testimony as well, and that would leave no proof of any kind of the letter having been sent the Trianon. While defendants feel that plaintiffs have treated them very harshly in these suits, still we do not believe counsel really desire this court to ignore these ancient rules of fair dealings between men. After all that is what law is, or should be; rules of fair dealing. But plaintiffs seem to be free from edicts of State Courts, as we shall presently point out, maybe they are above the teachings of Holy Writ. We express no opinion. (Altho we hold one.)

But let us examine Stanley's testimony a little further; maybe there are other reasons for not believing him.

The Attorney General brought proceedings against the Society and all its members and agents, including Stanley; he was named individually. Plaintiffs' own

counsel testified (Tr. 73) that a general injunction was issued August 7, 1935, restraining the defendants therein from doing anything in connection with their business affairs. The injuncton is not set forth in full but counsel will admit that the defendants were restrained from cancelling licenses or making any collections thereon. A receiver was appointed on August 13, 1935, to take complete charge of the Society's affairs; license contracts were especially mentioned. Yet Stanley boldly testified that in spite of the court order he went down to Portland, Oregon, and there on August 21, 1935, sent out letters of cancellation to *all licensees in the State of Washington.* He says he was acting under instruction of the home office of the Society. (Tr. 113) Is it any wonder that one who would thus defy a court order would not hesitate in testifying about having checked the post office records the next day? He was in Oklahoma when he so testified; far from the reach of Washington authorities. So it seems clear that there was no competent evidence that the Trianon license had been cancelled.

Lockhart and Tarry Inn Cancellations

Except as will later be pointed out, plaintiffs do not question the validity of the receivership proceedings or that the receiver assumed control over all license

agreements. They cannot question them, because *they introduced in evidence the final court order.* Par. 7 says the receiver is instructed to turn back to the Society all agreements, licenses, etc. (Tr. 80). Moreover, Haughland, of counsel testified that the injunction was issued and a receiver appointed. (Tr. 73). Certainly the state court was not entering idle or meaningless orders. It would have been only silly for the court to have directed the receiver to collect on all license contracts up to January 1, 1936, and then turn over all license contracts to the Society, if no such license agreements were even in existence. If Stanly had the power to cancel the contracts after the appointment of the receiver, then the court's order would have been a nullity. If it were a nullity then why did counsel introduce it? But having introduced it plaintiffs must concede that the receiver was in charge of the contracts from his appointment August 13, 1935, to his discharge June 8, 1936. Then it follows that Stanley had no authority to cancel these and *all* other licenses on August 21, 1935. At that time he had no more authority to cancel them than had a mere stranger. Plaintiffs say they were the only cancellation notices ever sent the defendants.

Plaintiffs' counsel, Haughland, was present in the state court when that final order was entered. We need not concern ourselves about the laws governing

the power of the state court to appoint such a receiver, and the power of the receiver over these contracts. The fact that plaintiffs introduced the final order in evidence is sufficient to control plaintiffs; they thereby indorsed whatever the order contains.

But the cancellations would have been faulty had they been sent by competent authority. Even in those letters, sent in defiance of court orders, no mention is made of failure to pay fees, or is there any other breach stated. Indeed, without considering the state court injunction the cancellations were faulty. The license contracts could not be cancelled merely at the whim of the Society. They could be cancelled only for *cause, or at the end of the yearly date of the contract.* The Tarry Inn license was dated March 1, 1935. It could not have been cancelled on September 1, 1935, except for cause. It could not have been cancelled otherwise before March 1, 1936. But Stanley fixed the date September 1, 1936, *without citing any beach of the contract.* (Tr. 115). Even common courtesy, to say nothing about the plain terms of the contract, would have required a reason given for cancellation. Stanley's cancellations were of no consequence in any view of the case.

Plaintiffs destroyed their reply by introducing the very contracts they denied were in existence. Then they proceeded to destroy those letters of cancellation by the testimony of Haugland that a receiver had been appionted eight days prior to the sending of the cancellation letters. (Tr. 73).

On page 40 of the brief they say: "There is no proof to rebutt the cancellations." Oh! Yes there is; plaintiffs' own evidence. (Tr. 80, Par. 6 and 7). *The court commands the receiver to collect on all license contracts up to January* 1, 1936, and then turn *all contracts* back to the Society. If all contracts had been cancelled as plaintiff's witness testified (Tr. 114) or if the receiver had failed to "adopt" them as counsel contend in their brief on page 38, then to what contracts did the court have reference? To *all* contracts; not just the ones the receiver had "adopted." Plaintiffs themselves introduced that court order. (Tr. 80). They are bound by their own evidence. They cannot be here arguing that the contracts had been cancelled by Stanley. The state court did not recognize Stanley's cancellations. Then why should the trial court have done so in these cases, or why should this court pay heed to them? (There seems to be but one reason for appealing these cases: just to wear out weak opponents. Stanley and

the plaintiffs will probably defy this court's orders, any way, if their past conduct is any criterion.)

The rule that parties are bound by their own testimony is as old as the hills. Even in the Book of Job (Chap. 15, 6) we read:

> "Thine own mouth condemneth thee, and not I: yea, thine own lips testify against thee."

We dare say that those words when thus uttered were very old. Historians are not agreed as to the date of the writing of the book of Job, but certainly it is of great antiquity. Doubtless the principle was then well founded, and had been for centuries.

Plaintiffs' evidence, this court order, clearly shows the contracts were in effect June 8, 1935, the date of the order. What transpired between June 8 and December 1, 1936, is unknown to the defendants. There is no record of any activity on the part of the Society between those dates; no record of the Society ever having mailed the defendants the usual monthly statements, or advised them that the Society was again permitted to do business in the state or that their old licenses had been cancelled. The nearest they came to that is found in a letter December 8, 1936, written by Kenin, wherein he says he was under the "impression" that all music ushers of Washington had been informed that the Society could resume operations.

(Tr. 65). It would seem that plaintiffs brought these suits carelessly; they were merely under the impression they had causes of suit. That is the best light that can be given the matter.

Let us assume that Kenin was endeavoring to tell the truth; still we find his testimony no more dependable than Stanley's (Tr. 101). He says the Lockhart license was cancelled October 1, 1935, *for delinquency.* That is completely at variance from the contents of the cancellation letter (Tr. 116); it gave no ground for cancellation. He also said Lockhart owed for the period, January 1, 1935, to October 1, 1935. He knew better than that. Plaintiffs' other evidence, the State Court decree, took all those fees from the Society and gave them to the receiver. Whether Lockhart paid or still owes the receiver is of no concern of plaintiffs. Kenin is a lawyer; he knew when he testified that Lockhart did not owe the Society for the period stated. He also knew the letters sent by Stanley were mailed without authority and contained no reason for cancellation. He was on the witness stand when the Lockhart letter was offered in evidence; and he also introduced the court decree. He couldn't very well have been mistaken about such vital matters, or at least he should not have been.

The receivership case was dismissed in June, 1936.

But there is no evidence that any of the defendants knew of it. Instead of plaintiffs promptly advising all licensees of that fact and sending them statements for fees due, or valid letters of cancellation, what did plaintiffs do? In December, 1936, they at least led the defendants to believe that they were still forbidden to do business in the State of Washington. Their letters to Lockhart and Tarry Inn (Lyons) (Tr. 98 and 121) contain this statement:

> "We have heretofore endeavored to maintain in the State of Washington—a branch office of the Society—. However, local State officials have taken such steps as to nullify our desire to render such service, etc."

What would be the natural deductions for defendants, or even their counsel, to draw from such statements? Simply this: that they were still barred from the State, of course. True, defendants are supposed to know the law but they are hardly expected to keep track of plaintiffs' litigation, especially when they receive such letters.

Let us further examine those letters (Tr. 98 and 121). Even assuming defendants had never been issued licenses, the signing of applications would not have prevented these suits. No statement is found in the letters that if applications were made that suits would not follow. In fact, the contrary appears:

"—— we have no alternative—but to bring suit, etc." So an application would have availed defendants nothing.

But supposing plaintiffs in sending out these threatening letters were trying to compel defendants to take out new licenses, we must assume the new contracts would be like the old ones—blanket licenses. That is, the defendants would have to purchase the rights to all the Society's millions of compositions to get the few desired; not an equitable matter by any means, but we will not go further into the matter.

The first evidence we have of the Society's activity is Kenin's letter to the Trianon December 1, 1936. (Tr. 88). Therein he claims the Trianon was infringing the Society's copyrights. He doesn't at--tempt to cancel the old license then in existence. After seeing how the Society had attempted to defy and nullify the state court's orders in sending out bogus letters of cancellation is there any wonder that these defendants were somewhat skeptical and confused as to just what had transpired in the receivership proceedings? Kenin's first letter was dated December 1, and the complaint was verified December 21, only twenty days later. Rather rapid work.

Possibly defendants were confused as to their rights, but their confusion did not lessen their rights. Sup-

pose that my uncle dies a millionaire and leaves me his fortune. I believe him to have died a pauper. My erroneous estimate as to his worth does not rob me of his estate. So the defendants' rights are not what they may actually have believed them to be when talks and correspondence were going on. They may really have believed the state court had cancelled their licenses. But their beliefs or doubts did not take away their rights under the contract. There are at least three reasons why the cancellations mailed from Portland were faulty: 1. They were sent in defiance of a court order. In fact, the letter prcatically so states. "The rights of our members, as copyright owners, are in no way affected by the pending litigation." (Tr. 116). 2. The receiver on August 21 had charge of the license contracts. Mr. Stanley had no authority over them whatsoever, consequently could not have cancelled them. 3. The letter sets forth no grounds for cancellation, such as non-payment of fees, etc.

Plaintiffs' evidence, the state court order, (Tr. 80), shows the license contracts were in effect June 8, 1936. No cancellations were sent after that date. So we are ready to turn to plaintiffs' other out, "abandonment."

ABANDONMENT

Plaintiffs tried the cases on the theory of having cancelled the license contracts. Not one word of testimony was offered at the trial regarding "abandonment." That term or any similar term or expression is not found anywhere in the record. Abandonment was not pleaded nor was it testified to in any manner. At the trial plaintiffs seemed perfectly satisfied with their proof of cancellation. Weeks afterward the defendants first learned of the abandonment theory when they saw it in briefs filed with the court.

But in what manner had defendants abandoned the contracts? Let us examine them. What were they about? Merely this: the Society sold to the defendants the right to perform in their places of business all of the musical works of the Society's members, and for those rights the defendants agreed to pay certain sums of money. The Triannon had held its license for many years, since 1927. It had been automatically renewed from year to year. On that contract it had paid $2400.00. It was a vital contract.

After the license contracts were issued the defendants naturally took charge of such pieces of music belonging to the Society as was required for their needs. *They took possession of the Society's property as they had a right to do. And they have never*

released such rightful possession. At least, certainly not up to the dates of the alleged infringements. The agents of the Society called at the defendants' places of business and found what? That all the defendants were still in possession of their musical works. They had not abandoned the property covered by the contracts; at least plaintiffs so testified. Again they are bound by their own evidence.

But where, when, in what manner had defendants abandoned the contracts? No one knows. The most that can be said is that they had not paid their fees, although they had paid every statement sent them. And Mr. Savage of the Trianon expressed his doubts about the Society's right to do business in this state; that it was an illegal institution; that it illegally controlled music. But such doubts and expressions could not be termed an abandonment of a corporation's contract. In several of the cases cited by counsel the licensees rebelled at the terms of their contracts; but their displeasure did not deprive them of their rights under those contracts. Between June 8 and the date of the alleged infringements committed in November and December of that year, none of the defendants had heard from the Society. Kenin testified that he had not sent any statements. (Tr. 110). Continuing in possession of the plaintiffs' property did not show an intention to abandon it. One cannot

be present and absent from a meeting at the same time. And by the same logic one cannot abandon a piece of property and at the same time keep possession of it!

But non payment of fees did not work an abandonment. Par. 6 (Tr. 107) says that failure to make payments is only a ground for cancellation. But from what date had they failed to make payments to the Society? Only from June 8, 1936, for the receiver was in charge up to that time. Whether they paid the receiver is of no concern to plaintiffs, for the fees to January 1, 1936, went to the receiver. (Tr. 83).

Plaintiffs quote from a letter written by Mr. Savage of the Trianon (Brief 14). Apparently Mr. Savage felt the Society had not treated the users of music fairly on the matter of rates. He suggested that the Society meet with a committee of users to discuss the rate question. But can that be interpreted as an abandonment of existing licenses? Hardly. A hundred committees might meet without effect upon their signed contracts. They might suggest a higher or a lower rate or even sign applications for new contracts without in any way altering or changing the rights of any of the parties thereto.

We have no quarrel with plaintiffs' cases on aban-

donment. We will first cite our own authorities on the subject and will later analyze their cases.

"American Jurisprudence," Vol. 1, p. 12, No. 17:

> "Abandonment must be made to appear affirmatively by the party relying thereon.—As a rule therefore, abandonment or an intention to abandon, is not presumed.—The burden rests upon him who set up abandonment to prove the same by clear, unequivocal and decisive evidence."

"Sets up," "appear affirmatively," "abandonment," do not appear anywhere on any page of the record, either in the pleadings or in the evidence, or is there any similar terms used. This authority says the *burden is upon him who sets it up to prove abandonment.* They neither sets up abandonment nor offered any proof thereon. *Plaintiffs are not assuming the burden.*

Certainly if plaintiffs had pleaded abandonment they would have had to offer definite, "clear, unequivocal and decisive evidence" in support of such pleadings. Then merely because they failed to plead abandonment can plaintiffs be relieved of the burden of offering equally definite proof thereof—stated in terms the court and all parties concerned would understand? Not only did plaintiffs fail to plead abandonment of the contracts, but they denied in their reply that any contracts had been made. The first defendants heard of the theory of abandonment

was in a brief filed by plaintiffs weeks after the trial. Had they pleaded abandonment defendants would have had an opportunity to refute it at the trial. Under the pleadings all defendants had to do was prove they were licensed. *Plaintiffs* relieved them of that burden by introducing the contracts.

> "Mere lapse of time does not work an abandonment."—Moon vs. Rollins, 36 Calif. 333, 338.
>
> "The burden of the issue was upon the defendants." (The party who had set up abandonment.) — *Bradley vs. Blandin,* 110 At. 314. (No. 13-16).
>
> "The burden of showing a discontinuance, vacation or abondonment is upon the party who asserts it."—*Town of Basic City vs. Bell* (Va.) 76 S. E. 336 (338).

Many other cases might be cited along this line. Both the text books and the cases discuss very little the matter of pleading abandonment, but all those which do mention it say it should be pleaded. And all the cases which we have read dealing with this subject were tried on the theory of abandonment and the inference is that abandonment was pleaded. ***That** was true in all of plaintiffs' cases.* But *all* the text books and cases on contracts say that such matters as fraud, breach, coercion, failure of consideration,

modification, etc., *must be pleaded.* Can it then be supposed that a matter equally as important, such as abandonment, may be relied upon without pleading it? On page 26 of their brief plaintiffs quote from Restatement of the Law on Contracts. Their quotation is taken from pages dealing with "Rescission" and that high authority says that such matters must be pleaded. Plaintiffs relied upon cancellations entirely at the trial, and rely upon them still. But if the court fails to recognize them, then they turn to abandonment. It would seem that some date should be fixed at which they must make up their minds. We suggest the date of their pleadings; certainly not later than the date of trial.

A large number of the cases we have found dealing with abandonment were foreclosures of real estate contracts. *And in every case there had been an abandonment of the property in question.* In not one case do we find the defendant remaining in possession of the premises. It is only absurd to claim an abandonment when the defendant still keeps control of the property, as plaintiffs herein accuse the defendants of doing.

These cases had been pending nearly two years before they came on for trial; during all that time defendants' answers contained the allegation that

defendants held licenses. Plaintiffs had ample time in which to have pleaded in their reply "abandonment." But no mention was made of it until after the trial was over. Had they pleaded abandonment then both sides could have offered testimony on that important issue. The trial court could not pass upon the testimony that plaintiffs should or could have offered: *It could not find that plaintiffs had proven abandonment by "clear, unequivocal evidence."* When did abandonment take place? The record is silent. *Yet the court is accused of erring because it did not find there had been an abandonment, without any testimony whatsoever being offered on the subject.*

The authorities are uniform in holding that a judgment must conform to the pleadings. That principle is so well established, we will not quote authorities. Then the court could not have made a finding that the defendants abandoned the contracts.

FORFEITURES

The courts are uniformly against forfeitures. This is so well known that we will burden this brief with but one citation.

> "The intent to abandon and the *actual relinquishment* must concur, for courts will not lightly decree an abandonment of property so valuable as that of water in an irrigated region."

(Italics ours). — *Miller vs. Wheeler,* 54 Wash. 429,435.

The defendants in the cases at bar were possessed of valuable rights; at least great value is placed upon them. They claim that Lockhart damaged them, by playing only eleven pieces one evening, nearly $3,000.00. Does it seem that merely because he had not paid his fees between June 8 and December 1, that he should be subjected to such severe penalties? Especially when the fault lies more with plaintiffs than with Lockhart? At least they should have mailed him statements.

Lockhart and Tarry Inn Cases

On page thirty-six of their brief, counsel argue that Lockhart should be penalized because he did not keep a file of his correspondence. A pretty severe doctrine, even though the contracts had made such requirements essential, which they did not. They say: "He does not state that he is possessed of a license." Was it necessary for him to prove a license had been issued to him when plaintiffs testified they had cancelled his license by Stanley's having sent that letter of cancellation from Portland? How could they have cancelled Lockhart's license if one had never been issued to him? True, his license was not offered in evidence, but Kenin testified for plaintiff

(Tr 101) "I can't give the date of its issuance. Can give the date of its cancellation. Cancellation notice sent August 21, 1935." That is a definite admission Lockhart had been issued a license. Once issued, it would remain in effect until it was cancelled according to its terms. The only evidence of its having been cancelled is Stanley's letter.

Lockhart paid $90.00 per year under his contract. He owed at most only for the year 1936, or $90.00. In a suit on the contract that is all plaintiffs' could have collected. But plaintiffs here sued him on eleven counts, calling for maximum damages of $55,000.00 or minimum damages of $2,750.00 plus costs and counsel fees, making a minimum judgment of well over $3,000.00. That is probably the reason why plaintiffs sued on infringements instead of on the contract. In so doing they stool to win, if successful, thirty to fifty times as much. Apparently plaintiffs were smarting over the receivership proceedings so they endeavored to make up their losses on these little defendants; otherwise, why the eleven counts against Lockhart alone? There must have been some good reason for these heavy demands.

Supposing Lockhart had never been licensed. What were the actual damages suffered? What value did the Society place upon the music of its members?

Well, Lockhart's contract was for $90 per year, or about 25 cents per night. So the actual damage suffered was only a few cents. But they are here seeking damages from $3,000.00 to $55,000.00 against Lockhart.

Counsel says on page 36 of their brief that no witness was called for Tarry Inn. Why should there have been? Plaintiffs introduced the license contract. That is all the defendant needed to do. (Tr 105) That license granted the right to perform the music in question, until cancelled, *at* 1409 *First Ave.,* Seattle. Kenin testified; "I know it refers in the contract to the Spider Web at 1409 First Ave., and that is the same location as the Music Hall." (Tr. 110) There is nothing in the contract to prevent the license from changing the name of the place everyday if he wanted to.

On page 39 of their brief they say that the Tarry Inn license was to continue only so long as the present policy is maintained—"Namely, not more than three musicians." (A pretty sever regulation; but let it pass.) The contract *doesn't say any such thing.* It reads (Tr. 108) "This license *rate* to be in effect etc." "This license *rate*" is altogether different from saying "this *license* to be in effect, etc."

True, the Society could have cancelled the license because four musicians had ben employed instead of

three, but that fact did not cancel the contract. Moreover, complaining about the four musicians is a recognization that Lyons Music Hall and the Spider Web were one and the same. Tarry Inn had violated its license contract by employing four musicians in the *Lyons Music Hall*, is a fair interpretation of their testimony. (Tr. 110).

On page 37 they refer to Mr. Heiman. Let us suppose that Mr. Heiman suggested a new license contract to start January 1, 1937. Of what possible consequence is that? A mere talk about a new contract would not cancel the old one. Maybe Heiman hoped to obtain for Lockhart a better rate, one-half or one-third the rate then in effect. Of course, under such circumstances he might advise Mr. Lockhart to sign a new contract. There is no evidence to the effect that Mr. Heiman had authority to bind Lockhart or even that he ever advised anyone that Lockhart's license had been cancelled. The Lockhart answer on file is signed by Heiman; it is there stated that Lockhart still had a license at the time of the alleged infringements. Whether Heiman knew at the time he talked with Meriwether that Lockhart had ever held a license or that the receivership proceedings had been terminated does not change or limit Lockhart's rights granted him under the con-

tract. Suppose that Heiman actually believed the letter of cancellation to be valid; that does not abolish Lockhart's rights. Of course, there was much confusion about the effect of the receivership matter. *Even the Home Office of the Society, undoubtedly acting upon advice of counsel, instructed Stanley to ignore them.* They say in those famous and unusual letters of cancellation "The rights of our members— are in no way effected by the pending litigation." Is it to be wondered at that Mr. Heiman or these defendants were somewhat in doubt of their rights, when the Society was? If the Society were not confused, that is all the worse, for it was then definitely and intentionally defying the court. These defendants are not lawyers and may have been ignorant of their rights. There is no evidence that Heiman, Lockhart or Tarry Inn had ever ben advised that the receiver had been discharged and the state case closed. They were not parties to the state suit. We can assure the court that Mr. Heiman knew practically nothing about the State case when he was supposed to have participated in the negotiations for new licenses. Having received at least one phoney letter of cancellation and having been told by Kenin (Tr. 98) that the Society was still banned from the State can these little people be blamed if they were somewhat

in doubt about these matters? The defendants may have been in doubt about their rights, but the counsel who is writing this brief has never been in doubt about the effect of the letters of cancellation sent by Stanley; he accordingly advised his clients they were still licensed.

PLAINTIFFS CASES

Gerlach-Barklow vs. Morris and Bendien, 23 F. (2nd) 159. (Page 15, Plaintiffs' brief).

This case correctly held the burden of proving a license was on defendant. But the plaintiff there did not prove the license for the defendant as plaintiffs herein did.

Stodart vs. Mutual Film Corp., 249 Fed. 507. (Page 16.)

We do not believe counsel read this case. We do not find the quotation given. Their quotation reads, "Defendant sued—defendant had burden of proving that issue."

The defendant therein did not sue, he was sued. The *burden* of proving in that case was the burden of defendant showing title in itself by purchase from a third party.

Burton vs. State Gas Co., 188 Fed. 161. (Page 16.)

In plaintiffs' quotation we find the following: "The

circuit court found it was terminated by the appointment of a receiver." But the court in the Washington case made no such finding. In fact, the final decree (Tr. 83, No. 6) recognized the licenses and ordered them turned back to the Society. Plaintiffs introduced the decree; they are bound by it. Moreover, the contracts there (Burton case) terminated at will, while in the cases here they are not.

Schellberg vs. Empringham, 36 Fed. (2nd) 991, Page 995. (Page 16.)

This case concerned a written article on medical treatment. Of course, the burden was rightfully placed upon defendant to prove his license because the plaintiffs did not prove it for him, as was done herein. We thank counsel for citing this case. There is nothing in it to suggest even half the legal services were performed that were rendered herein. Yet the court there awarded plaintiffs $2,500.00 as counsel fees. There were but three counts, while here there are twenty counts. There they sought but $50,000.00 maximum damages, while here the maximum is $100,000.00.

Russell, et al vs. Excelsior Stove, 120 Ill. App. 23. (Page 23.)

The court there held the defendant had made a "positive, unequivocal refusal to comply with its

terms." (Page 30.) The defendant sought a set-off while in default. No demand for payment was ever made of defendants herein to make payments. This case was tried on the theory of abandonment with definite proof offered thereon. But here abandonmen twas not even mentioned.

Reichert vs. Mulder, 235 N. W. 680. (Page 23.)

This case also was tried on the theory of abandonment. The parties had entered into a written contract; the defendant tried to prove an altogether different contract after having operated under the written one for twelve years.

Baker vs. School District, 233 N. W. 897. (Page 23.)

This case also was tried on the theory of abandonment. The teacher had abandoned the subject matter of the contract, her school, and relinquished all claims under her contract. Both parties had talked over the matter on the "abandonment theory." No damages were shown in any event, so the court was bound to hold for the district.

Rochart vs. City of Mount Vernon, 251 N. Y. S. 514. (Page 24.)

Plaintiff, an architect, sent in his bill and was paid in full; that ended the contract, of course. The matter sued upon referred to a different project from

the one named in the contract and was twelve years later.

Lathrop vs. Rice & Adams Corp., 17 Fed. Supp. 622. (Page 28.)

This case ought to be a lesson for counsel. For there the plaintiffs did what this plaintiff should have done, they brought suit on the contract. The court there says. (p. 626.)

> "No unequivocal notice has been given by defendant to plaintiffs that it was not using the inventions of plaintiffs.—A licensor is entitled to assume that his license remains such until the latter, *by a clear, definite, and unequivocal notice eminating from lawful and competent authority, throws off the protection of the license and stands admittedly as an infringer.*" (Italic ours).

What better case could be found for defendants. It clearly points out that an *"unequivocal notice"* must be sent by *"competent authority."* That thought is repeated many times in the opinion. This case, of course, was tried on the theory of abandonment. But in the cases at bar we find no *unequivocal notice* or notice of any kind eminating from "competent authority" or from any source whatsoever that the contracts were to be considered cancelled.

Hazeltine Research Corp. vs. Freed, Etc., 3 Fed. (2nd) 172, at 178. (Page 29.)

Also it is hard to understand why counsel cited this case. It, too, goes against them. This was a

suit to CANCEL a patent license contract, which plaintiffs had openly entered into. Counsel quoted from Par. 5, page 178, but forgot the preceding paragraph. It reads:

> "It is for this reason — it seems to me, that it is frequently and correctly said that the *mere non-payment* of compensation, in the absence of a clause in the agreement, is no ground for taking away the right to practice the invention."

Then counsel might have continued quoting from Par. 5, which reads:

> "Even in such case the non-payment is but a part of the *necessary proof* on the main issue." (Italics ours.)

The contract in that case was similar to the ones here before the court; they do not provide for automatic cancellation for mere non-payment of fees. A *written* and *valid notice* must be mailed, setting forth proper grounds for cancellation.

Then on page 179, the opinion adds:
"Equity does not favor forfeitures."

In this case the defendant endeavored to obtain a more favorable contract; still the court held that such an endeavor did not work a forfeiture of the existing contract. There the payments were much farther in arrears than in the cases at bar.

The court makes a very pertinent statement on page 177:

"The truth is that such grievances of fraud or mistake as now appears is a sham, and was never thought of until this lawsuit,, and was not really worked out then, until most able counsel had vigorously put the answer together."

Even there they pleaded the fraud and mistake. And the case was tried on that theory. But here the abandonment was not pleaded; the cases were not tried on that theory. Abandonment was a mere afterthought of "able counsel" made long after the trial.

Hunt vs. Moline Plow Co., 52 Fed. 745. (Page 30.)

Just why this case is cited we fail to perceive. The cases here on appeal are for alleged infringements. In discussing the above case, counsel seem to be talking about a suit for royalties. But there the *licensee had written a letter cancelling his contract.* Of course, the plaintiff in that case could not sue for royalties years later on. Is that any reason for herein granting plaintiffs these severe judgments?

American Streetcar Advertising Co. vs. Jones, 142 Fed. 974. (Page 30.)

Here no written contract was entered into. The plaintiffs sued upon a contract that might possibly have been interpreted from the letters written by the parties. On page 977 the court said:

"That the defendants did not understand that

they had entered into any contract, etc.'

We fail to see wherein this case has any bearing on the issues involved in the cases at bar. The contract there failed because the gods in question were not of sufficient merit to sell to the public.

American Jurisprudence, Vol. 12, p. 959, Sec. 382.

"If one party refuses to perform, etc.'

But there is no evidence of any kind in the cases at bar that the defendants failed to pay every statement mailed to them; in fact the testimony is directly the opposite. This authority refers to "Repudiation." But repudiation and abandonment are not similar terms by any means.

Computing Scale Co. vs. Barnard Co., 259 Fed. 250. (Page 31.)

This was a suit for royalties, not for infringements. The contract there could not be cancelled merely at the wish of either party. If the inventive device was a success, the contract stood; that was a matter of fact. If it were a failure, the contract was subject to cancellation. The licensee thought the device faulty and so advised the owner. The court said (Page 254.):

"If he knew the Scale Co. deemed the contract cancelled—and kept silent for the longest period permitted by the statute of limitations, it must at once be evident that he must meet the charge

of estoppel so arising."

The Society did not know that any of the defendants deemed the license cancelled. They had never event talked with Tarry Inn at all, or with Lockhart about a license. (Tr. 104.) In any event we see nothing in the above case of assistance in deciding the cases here on appeal.

> *American Pastry Products Corp. vs. United Products Co.,* 39 Fed. (2nd) 181. (Page 39.)

This case was decided correctly, but it does not apply here. Of course, if Tarry Inn had opened a new place in Spokane or elsewhere, the license issued for 1409 1st Ave. would not have been sufficient. But the testimony of Mr. Kenin (Tr. 110) was to the effect that the defendant had issued a license to operate a place at 1409 1st Ave. The fact they referred to four musicians at the same place (Tr. 105) shows they all knew it was the same business. There was nothing in the license to prohibit the change of name of the place.

> *Kemmerer vs. Title and Trust Co.* (Ore. 1918), 175 Pac. 865. (Page 27.)

Here the plaintiff had removed himself and his personal property from the land and wrote a letter stating plainly that he was abandoning the property.

Of course, the court held he could not compel repayment of sums paid under the contract.

MISCELLANEOUS ERRORS IN PLAINTIFFS' BRIEF

On page 7, plaintiffs speak of the Society closing its office, as though that would work a cancellation of the contracts. They could have closed all their offices but that would have no effect upon the contracts. And on page 11, they say: "This resulted in a voluntary closing of their offices." The Society did not close its office voluntarily, or involuntarily; the court injunction closed it, or rather the receiver took charge of it. The only closing on the part of the Society took place at midnight when this same Stanley unlawfully entered the offices after the appointment of the receiver. He probably closed the door when he went out. He left that same night under cover of darkness for Portland, where, in defiance of the court order, he sent out the letters of cancellation. All this is to be found in the records of the state case. (Also Tr. 113.)

At the bottom of page 29 of the brief, counsel ask what chance would plaintiffs have in suits for royalties. That is of no concern to this court. Possibly plaintiffs fear that their conduct in defying the state court orders might prejudice other courts against

them in suits for royalties. The defendants confess that plaintiffs have not made a very good record in the courts of this section of the country. It was wholly their own misdoings that lost these cases. But their lack of confidence in suits they might bring for royalties is no reason why this court should inflict such severe penalties against these defendants as are herein requested. Just what handicaps plaintiffs will suffer in their future litigaton does not here concern us. Doubtless they will many times run into their own trail of doings and misdoings, as they have in the past.

On page 29, they also say: "The receiver had been discharged with an order terminating any licenses expiring during his operation, and terminating any he many have continued, etc." They assume that the license here in question expired under the receiver or were cancelled by him. Counsel have forgotten their own evidence, the final court order, which directed the receiver to turn back to the Society all license agreements. (Tr. 83.) These contracts did not terminate under the receiver and he did not extend them. He could have cancelled them for cause, but he did not. Moreover, on page 38 they contend that the receiver did "not adopt the license contracts." If that be true, then the contracts stood

as though the receiver had not been appointed. How then could they be prevented from collecting their royalties, unless perhaps their own wrong doing interferes? In any event the contracts show clearly that they renewed themselves from year to year. The Trianon license was made twleve years ago, back in 1927.

On page 32 of brief, counsel says: "The defendant stated that the plaintiffs could not collect fees." There isn't a word of testimony to that effect. But suppose the defendants did believe the Society had been doing business illegally and so expressed themselves, and suppose also they had been coerced into signing the contracts—are those valid reasons for placing a penalty of these many thouasnds of dollars against them? In several cases cited by plaintiffs, the licensees felt greatly abused, but that feeling did not nullify their rights under their contracts.

BURDEN OF PROOF

Need we mention this? Plaintiffs themselves proved the Society had issued these defendants licenses. They introduced the signed contracts. Then where does the burden of proof rest? With plaintiffs. They must prove the cancellations in order to prevail. That, they have utterly failed to do.

COUNSEL FEES

First let us call attention to the affidavit of Clark R. Belknap, attached to the motion to dismiss (a portion of it appears on the last page of this brief), wherein he stated that Mr. Haugland asked the court to allow the same fees in the cases in which the plaintiffs prevailed that were allowed the defendants herein. But in any event, Judge Cushman is an old practioner, and has had long experience on the bench. He knew the almost innumerable times defendants had been in court. He knew of the labors which were performed and which are unknown to this court. Judge Cushman needed no lawyers' testimony on the matter. But a competent attorney, Mr. Ross, did testify, he was the only witness called. The court announced its decision of February 13, 1939, and on that date counsel for defense notified the court in the presence of the plaintiffs' counsel that the defendants desired to offer testimony as to the value of services performed. The case was continued until March 10. Certainly the plaintiffs had an abundance of opportunity to offer testimony on the subject. They made no offer. Therefore, they cannot now complain, nor should they, for the fees allowed were reasonable. We here state that it was unknown to the defendants' counsel that Mr. Ross' law

firm had happened to be representing one of the defendants in some other matters. But that is of little consequence, because these counsel fees, as everyone well known, go to counsel and not to defendants. So as a matter of fact, Mr. Ross was testifying for the benefit of counsel and not for defendants.

Plaintiffs sought judgment in the discretion of the court and as limited by the copyright law. That law fixes a minimum damage of $250.00 dollars and maximum damages of $5,000.00 plus costs and counsel fees *per each infringement.* Plaintiffs accused Tarry Inn of committing four infringements, calling for maximum damages of $20,000.00 plus costs and attorneys' fees; against the Trianon five counts or $25,000.00 damages plus, etc.; against Lockhart, eleven counts or $55,000.00 plus costs; or a total of $100,000.00 plus. In discussing the matter with the trial court, counsel stated they did not desire heavy damages; just the minimum damages. Of course, *they* were heavy enough, but if plaintiffs did not mean business when they filed the suits, why did they so word their complaint, and why the eleven counts? The defendants had to try the cases on the pleadings as drawn. If plaintiffs merely wanted to jog Lockhart's memory, they could have sued on only one count. There must have been a good reason for

eleven counts.

The principal briefs and arguments in these cases were made in March, April and May, 1937; *The arguments were so extended and the briefs so involved and elaborate, that the court held the matter under advisement for over nine months before making a decision on the matters therein discussed.* That one fact is sufficient to show that counsel for defendants had made unusual preparation for the defense of these cases.

True, since plaintiffs lost, of course, they are willing to talk about minimum damages. Although minimum damages would total $5,000.00 plus costs and counsel fees. Imagine the thousands of sandwiches Lockhart would have to sell in his little eating place in order to take in $3,000.00; let alone paying out such a sum. But plaintiffs have obtained larger fees in some of their other cases in which the litigation was brief and contested lightly in comparison to these cases. Here are a few of such cases.

Witmark vs. Pastime Theatre, 298 Fed. 470 $100.00 per count.

Buck vs. Jewell La Salle, 32 Fed. (2nd) 366 $100.00 per count.

Feist vs. Dreamland Ballroom, 36 Fed. (2nd) 354 $100.00 per count, three counts, $300.00.

Witmark vs. Calloway, 22 Fed. (2nd) 412 $250.00 for one count.

Remick vs. General Electric, 16 Fed. (2nd) 829—$1000.00 for one count. This case indicates that the courts have given attention to cases where lots of work has been involved.

Waterson, Berlin & Snyder vs. Tollefson, 253 Fed. 859 — $100.00 attorney fee for one count. The court points out that there is a maximum penalty of $5,000.00.

These cases show an average of $250.00 per count.

Schellberg vs. Empringham, 36 Fed. (2nd) 991.

This was one of plaintiffs' cases. We have already pointed out that a fee of $2,500.00 was allowed counsel in a case that was not half so important as the cases here on appeal. There were but three counts there, while here there are twenty. Furthermore, this case *ended in the District Court.*

Stodart vs. Mutual Film Corp., 249 Fed. 507. Cited on page 16 of plaintiffs' brief. A fee of $300.00 was allowed on a judgment of but $900.00. Practically the same as was allowed by Judge Cushman. This case also ended in the lower court.

CONCLUSION

If we eliminate from plaintiffs' brief those statements which are a repudiation of their own evidence, we find little to answer. Certainly there would not be sufficient left to warrant this appeal. It is clear from plaintiffs' own evidence and argument, without even a word from any of the defendants, that these

suits should never have been brought. Nearly three years ago these rich and powerful plaintiffs hailed these little folks into court and they have unmercilessly kept them there. For this we fail to see one, single, valid reason.

We can understand how the management of the Society, being thousands of miles from the State of Washington, and necessarily having to let subordinates handle these matters, should have ordered these suits, and in so doing might have labored under proper motives, but as soon as the defendants filed their answers, the Society's officials most surely realized that the suits were without proper foundation; yes, without any foundation. Upon learning of that, they should have immediately withdrawn these cases. For plaintiffs to have continued this litigation merely because they are strong and because they know these defendants cannot possibly stand the heavy costs necessarily herein incurred, is little short of—we were going to say criminal—well, that seems to be the right word. Courts are maintained for the settling of fairly honest differences of opinion, not for permitting the strong to wear down the weak with endless litigation. We fail to find in plaintiffs' brief a good and sufficient reason for bringing this appeal.

Let us assume that the Society's officials actually

believed the state court was going beyond its bounds in issuing the injunction and appointing the receiver. But since they accepted and endorsed the state court's final order, it is definite that plaintiffs were not acting in good faith when they offered in evidence Stanley's letters of cancellation and his testimony of having flouted the state court's orders. Such evidence is both ridiculous and false and should not be honored by this or any tribunal.

For these reasons we feel that plaintiffs should be penalized for having continued this litigation and for having brought this wholly unwarranted appeal. We are asking a penalty of $500.00, which is but ten per cent of the minimum damages sought by plaintiffs in these suits. There is an abundance of authority for such action.

> *Slaker vs. O'Connor,* 278 U. S. 188.
> *Roe vs. Kansas,* 278 U. S. 191
> *Mississippi et al vs. Aultman,* 296 U. S. 537.
> *Winston vs. Stover,* 299 U. S. 508.

This last case went up from this state

> "The motion of the appellee to allow damages is granted, and it is ordered that damages of one thousand dollars, payable to appellee, to be taxed against appellant."

The decisions of the lower court should be affirmed and the sum of $500.00 should be added to the judg-

ments there rendered against the plaintiffs.

Respectfully submitted,

CLARK R. BELKNAP,
Attorney for Appellee.

(*A Portion of the Affidavit of Clark R. Belknap, Filed With the Motion to Dismiss Appeal. Caption Omitted.*)

State of Washington, County of King, ss.

CLARK R. BELKNAP, being first duly sworn, on oath deposes and says:

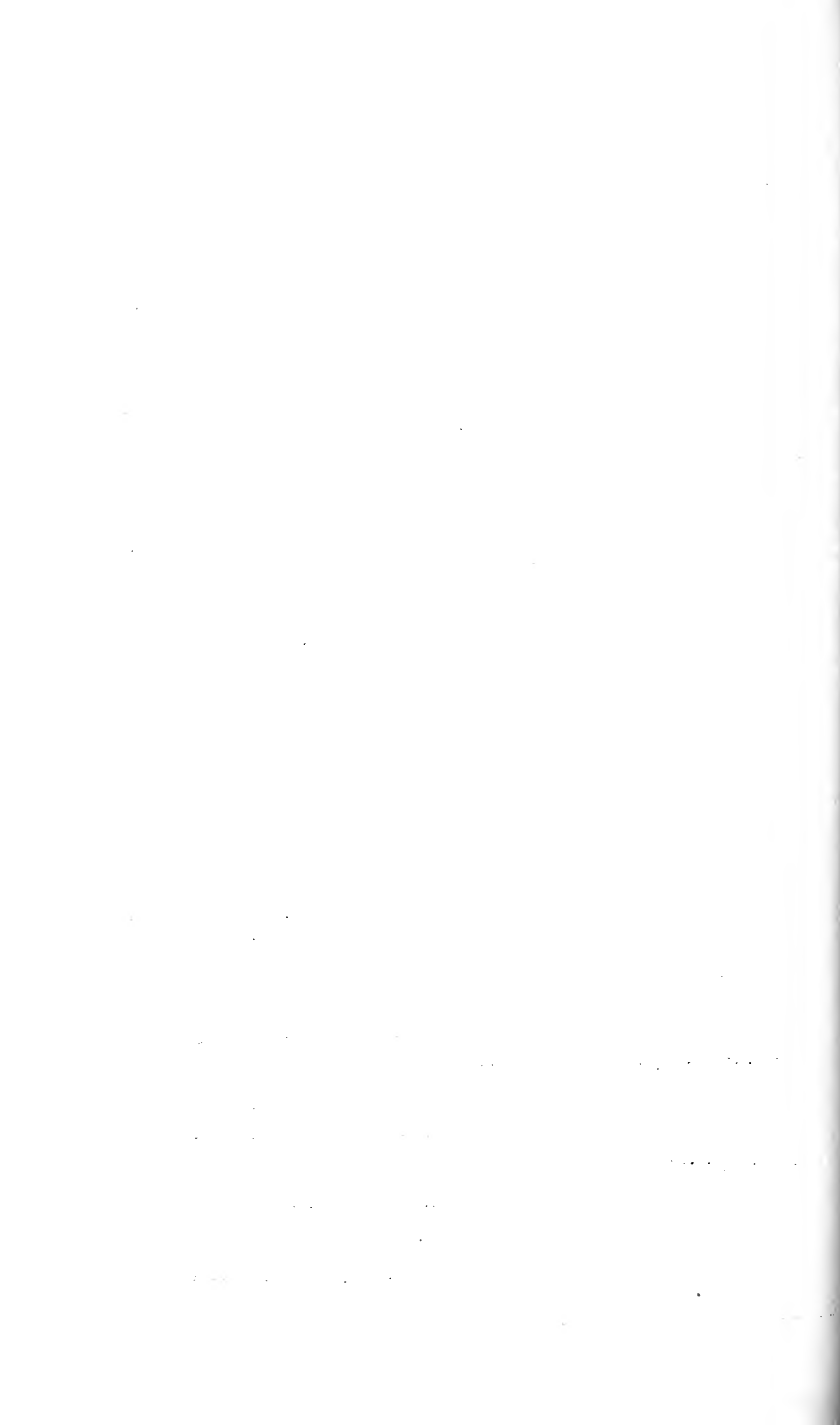
That he is the attorney for the defendants in the above and affiliated cases; that after hearing testimony of a witness for defendants and argument of counsel, the court awarded the counsel fees specified in the decree; that a few minutes after the court awarded the fees aforesaid the said H. W. Haugland addressed the court in about the following words: "Since the court is allowing $100.00 per count in these cases I believe the plaintiffs should be allowed counsel fees of $100 per count, or $600.00 and $800.00 in the cases in which the plaintiffs prevailed"; that thereupon the trial judge replied in words about as follows: "No, I don't want you to play horse with the court; you said plaintiffs did not desire special counsel fees in those cases; you must abide by that statement; your request is denied."

CLARK R. BELKNAP.

Subscribed and sworn to before me this 5th day of September, 1939.

H. M. JOHNSON,

Notary Public in and for the State of Washington, residing at Seattle.



No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Appellants' Reply Brief

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

H. W. HAUGLAND,
HERMAN D. KENIN,

Counsel for Appellants.

Arctic Building
Seattle, Washington

THE IVY PRESS, SEATTLE

FILED

OCT 9 - 1939

No. 9231

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Appellants' Reply Brief

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

H. W. HAUGLAND,
HERMAN D. KENIN,

Counsel for Appellants.

Arctic Building
Seattle, Washington

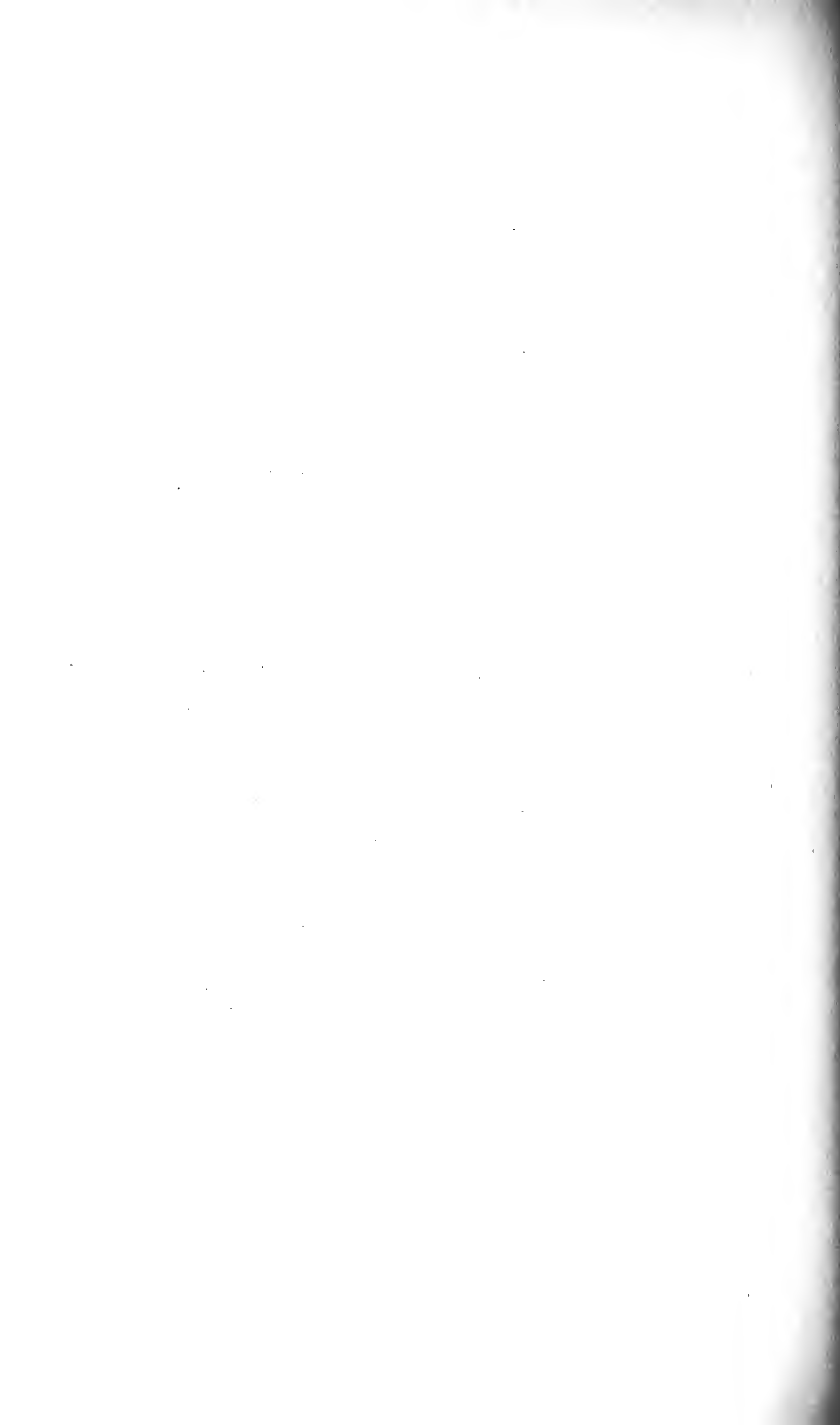


TABLE OF CASES.

Page

Arkansas Smelting Co. v. Seldon, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246 8

Cohan v. Richmond and Mayer, 86 F. (2d) 680 16

Griffith v. Tower Pub. Co., 1 Chancery 21 9

In re D. H. McBride & Co., 132 F. 285, p. 288 9

Lathrop v. Rice & Adams Corp., 17 Fed. Supp. 642 13

McAllister v. Sloan (C. C. A. 8th), 81 F. (2d) 707.. 13

Oliver v. Rumford Chemical Works, 109 U. S. 76, 3 Sup. Ct. 61, 27 L. Ed. 882 9

Schmidt v. United States (C. C. A. 8th), 63 F. (2d) 390 13

Waterman v. Shipman, 55 Fed. 982, 3 C. C. A. 371 9

United States Circuit Court of Appeals

For the Ninth Circuit

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

vs.

TRIANON COMPANY, INC., a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Appellants' Reply Brief

(Consolidated herewith are the cases of *Buck et alles vs. Lockhart,* No. 9233, and *Buck et alles vs. Tarry Inn,* No. 9232.

Appellee's argument is prefaced with a statement that complainants sought judgment against defendants of from $100,000 to $5,000. The suits were based on the Federal Copyright Law. The relief sought was an injunction restraining the defendants from publicly performing for purposes of

profit the particular musical selections copyrighted by complainants. The damages were set by Congress when they adopted the Copyright Law. Every opportunity was afforded the defendants to avoid this litigation. The complainants wrote numerous letters to each defendant; called to their attention the fact of infringement; asked them to legalize the use of the music, or to desist from such use. Their attention was specifically called to the Copyright Law, and to the damages which follow infringement. This conduct clearly demonstrates that plaintiffs desired to avoid litigation. The defendants' conduct demonstrates that the litigation was encouraged and invited by defendants.

In our opening brief we were extremely careful to make no reference unsupported by the record. Appellee has made numerous statements not supported by the record, and constantly refers to matters entirely outside the record. These are so irrelevant and immaterial that we hesitate to burden the court by explicit denials. Such unsupported and irrelevant statements we, of course, must and do expressly deny.

The record does not indicate the comparative size or financial strength of the parties. We do not know that the defendants are little defendants. Such

statements have no effect upon the court, but they are not properly in the brief, and it is eminently unfair for counsel to make such reference.

Appellee is not correct in their version of the cancellation rights afforded by the license agreements. The Trianon license provides for renewal unless either party

> "* * * Shall give notice in writing to the other of the desire to terminate the same at the conclusion of such year." (Tr. 86, Paragraph 4.)

This cancellation did not have to be by registered mail. The expiration date of the license was July 1. The cancellation notice was dated May 27, 1935, and conformed to the license requirements.

The form of the other licenses is found in Exhibit No. 19, Tr. 105. Appellee states this could be cancelled only for cause or at the end of the yearly date (Appellee's Brief, p. 11): Paragraph 4 of the agreement provides that

> "* * * Either party to this agreement may, at any time, upon giving to the other party thirty days prior notice in writing by registered mail, terminate this agreement."

The evidence of the cancellations of the licenses of the defendants Lockhart and Tarry Inn is not controverted. Each defendant signed the registered

letter return receipt. These show the delivery date of the notice of cancellation to Lockhart was August 23, 1935 (Plaintiff's Exhibit No. 18, Tr. 103) and Tarry Inn, August 22, 1935 (Plaintiff's Exhibit No. 20, Tr. 109). The defendants offered no testimony on this point, and counsel has failed to answer it directly.

Appellee has attempted to attack the veracity of appellant's witness, Mr. Stanley, by indicating that he could not possibly have confirmed the registration of the letters *by calling at the post office*. The statement of the witness is:

> "I did not mail it personally, but instructed my secretary to mail it. I confirmed this mailing the next day." (Tr. 113.)

Counsel further contends that, since complainants' witness gave this bit of hearsay testimony, it would then be improper for us to object to the testimony given by the defendant, Mr. Savage, and his counsel, to the effect that they called at the post office and were told certain information by a postal clerk. The difference is that objection was regularly made to defendant's testimony, and it was admitted by the court over objectieon. The above testimony of Mr. Stanley was brought out on cross-examination, and was, of course, admitted without objection. Its

admission would furnish no grounds for admitting the defendants' objectional testimony. Such testimony was hearsay and violative of the best evidence rule, and if such evidence exists, it should be proved in the proper manner. The new Federal Rules of Civil Procedure, Rule 44, Sec. (b), provides a further manner in which defendants could have proved the absence of a record, if such existed, by the certificate of the officer in charge. But we know of no rule of law that permits a party to give hearsay testimony.

Appellee speaks at great length regarding the alleged contents of an injunction of August 7, 1935, in the State case. This order is not in evidence, and therefore it is unfair for counsel to make any statement as to its contents. We cannot indulge in speculation or presumption, and we deny counsel's statements that complainants were restrained from concelling license agreements, by decree or otherwise.

From reading the final decree (Tr. 80), one gathers that the State suit was based on the theory that the Society was doing business contrary to the laws of the State of Washington. Any attempts on the part of the Society, therefore, to cease doing business in the State, were definitely in line with

the objects of that suit. But there is an additional point. A state receivership could have no affect upon the right of the Society to cancel its licenses, because such a receiver could acquire no interest in the intangible and personal property rights granted to the individual members of the Society by the Federal Copyright Law. It is well established that a copyright is not subject to attachment or execution in the State courts. This rule is set forth in 13 *C. J.* 1100, *Section* 255:

> "A copyright is not subject to seizure or sale on execution or attachment, and if the plate or physical means of reproduction is so seized and sold, the purchaser may not use it for the purpose of multiplying copies. A copyright may be reached and subjected to its owner's debts by means of a creditor's bill, but, the court would be compelled to decree and enforce a transfer in the mode provided by statute."

A further point is that a contract licensing the public performance of a song is a personal contract, and has been likened to the same personal relationship that exists between attorney and client, physician and patient, etc.

> "That rights arising out of contracts involving a relation of personal confidence cannot be transferred *in invitum* is an elementary rule. *Arkansas Smelting Co. v. Selden,* 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; * * * "

This view is expressed in the case of *In re D. H. McBride & Co.,* 132 F. 285, where the court, after setting forth the above quotation, adopts the following language, p. 288:

> " * * * But a license under a patent right is held personal to the licensee and does not pass to a receiver or administrator by operation of law. *Oliver v. Rumford Chemical Works,* 109 U. S. 76, 3 Sup. Ct. 61, 27 L. Ed. 882; *Waterman v. Shipman,* 55 Fed. 982, 3 C. C. A. 371. * * *
>
> "The precise question was considered in England by Sterling, J., in the recent case of *Griffith v. Tower Pub. Co.,* 1 Chancery 21, where, after reviewing the authorities, the learned justice held it clear that an agreement between author and publisher was of a personal nature, and that the benefit of it was not assignable by a receiver in bankruptcy. An injunction was granted against the receiver, who was threatening to sell all of his rights under the agreement between the author and the bankrupt publisher, to another publishing house."

We call attention to the fact that the Society was only a licensee from the owners. Surely it cannot be argued that a receiver of this agent could have acquired any interest in these personal intangible property interests of the agent's principal. And therefore, when the cancellation notices were sent from Portland, Oregon, in August of 1938, such was unquestionably the act of the owners of the copyrights and one which was legally within

their power. The individual plaintiffs in the instant suits were not defendants in the State suit. We quote the following from the case of *Waterman v. Shipman*, 55 Fed. 982, at p. 985:

> "Even if it were open to the defendants, under their answer, to assert that at the time when the suit was commenced the complainant's interest in the patent had vested in the receiver in supplementary proceedings, the contention would be untenable. The license was not assignable. No license is assignable by the licensee to another unless it contains words which show it was intended to be assignable. (Citations.) The present license contained no such words, and was purely a personal license to the complainant. Consequently the receiver could not acquire it."

We, therefore, respectfully urge that the receiver in a State Court would have acquired no rights in these particular license agreements, and they, therefore, were subject to cancellation at the will of the members of the Society.

But does counsel contend that these defendants acquired public performing rights in plaintiffs' compositions by reason of some contractual relationship with the receiver? We have pointed out that the burden of proving this would be upon the defendants. There is not one scintilla of evidence or testimony which would tend to show that the defendants had a license obtained from the receiver, or

approved by the court. Neither is there one scintilla of evidence that any contractual relationship was entered into between the parties to these suits, subsequent to the receivership. The evidence, on the other hand, is conclusive that the licenses were, if not directly cancelled by acts of the complainants, at least cancelled by the mutual understanding of the parties.

The point involved is that, if the defendants were relying upon a license agreement, the burden was on them to prove that they had a valid and subsisting license agreement, which was in full force and effect upon the dates of the admitted public performances. This they have utterly and wholly failed to do.

ABANDONMENT.

The appellee, in his discussion of abandonment, is using that term as a mode of divestiture of title to specific property, which is an entirely different matter from abandonment as applied to the law of contracts, and the evidence required to show abandonment of contractual relationships. Appellee apparently contends that they had some property rights by virtue of their license agreements. It is stated in the brief, page 18, that the defendants *took charge* of such pieces of music as were re-

quired for their needs, and that they have never released such possession. All that was given to the defendants by the license agreements was a privilege of publicly performing for purposes of profit certain musical numbers which had been copyrighted by the plaintiffs. This was an intangible privilege terminable at the will of either party. These license agreements did not involve any physical property, such as sheet music or musical instruments. And while defendants claim never to have released whatever property they had, the record does not disclose this to be a fact. The record in these cases merely shows that the particular songs set forth in the three bills of complaint were publicly performed on the single occasion as alleged.

Most of appellee's argument on this point seems to be based on the theory that complainants could not rely upon abandonment because it was not pleaded. The matter is properly before the court on the pleadings. The defendants set forth an affirmative answer, in which they alleged that they were possessed of licenses which had never been cancelled. To this affirmative matter the plaintiffs replied with a general denial. It would have been improper to have made further allegations in their reply. *Simpkins Federal Practice,* 3d Ed., page 306, section 341, states the rule:

> " * * * The important point to note is that affirmative defenses are deemed denied without any reply. In fact, a reply to an answer containing affirmative defenses only is not a legitimate pleading, unless ordered by the court."

Even though the matter were not specifically pleaded, it still is before the court by reason of the rules requiring amendment of the pleading to conform to the proof. Rule 15 of the Rules of Civil Procedure of this court so provide. We again quote *Simpkins,* page 311, section 352:

> "On appeal, the appellate court may regard a pleading as having been amended to conform to the proof,"

and cites the following cases as authority:

> *McAllister v. Sloan* (C. C. A. 8th), 81 F. (2d) 707;
>
> *Schmidt v. United States* (C. C. A. 8th), 63 F. (2d) 390.

It is, therefore, clear that, if there is evidence of abandonment in the record, the court must apply it.

Counsel has commented upon certain of the cases cited in our opening brief. One of these is *Lathrop v. Rice & Adams Corp.,* 17 Fed. Supp. 642, a case which we referred to because of the particular language used by the court. Counsel apparently agrees that, if unequivocal notice were given by competent

authority, then the licenses should be considered abandoned. What clearer or more unequivocal notice could be found than in the language of Mr. Savage, the owner of the Trianon. In response to the complainants' request for a license, he directly stated that complainant would have to rearrange their set-up; would have to engage in some new form of doing business; and finally directly stated he would not make an application for a license. This is about as explicit a denial as one could have. The other two defendants took the same attitude. They referred the complainants to their attorney, Mr. Heiman. Mr. Heiman did not claim that they were licensed, but sought to effect a compromise license agreement, dating the agreement so that public performances during the year 1936 could be waived. These defendants failed to respond to the preliminary notices sent prior to the institution of suit, calling attention to the infringements, and giving them an opportunity to take out a license. The defendants were merely requested to either take out a license or to desist from further infringements.

This conduct on the part of the defendants constitutes the evidence which so conclusively shows abandonment of any contractual relations. The nu-

merous letters sent by complainants, and the defendants' failure to answer these; the attempts by complainants, in the latter part of 1936 to reopen negotiations; the failure of defendants to comply with complainants' request that they take out licenses, and the failure of the defendants to immediately claim a license agreement, all drive home the point of abandonment so that it stands undisputed from the evidence in the case.

COUNSEL FEES.

We believe that no good purpose would be served by further discussion of other cases regarding the allowance of attorneys' fees. The instant cases stand alone on their facts. We do not believe that another case could be found where the defendants were given every opportunity to enter into a license relationship with the complainants prior to suit, nor where the defendants by their acts so clearly indicated that they would not negotiate for the lawful performances. After suit, the defendants claim incidentally that they performed the numbers under the protection of a license, which they further claim was procured by coercion. The defendants admitted that they made no payments on license fees

since August of 1935. They, therefore, admit that they have completely ignored their responsibilities under a license. It seems most inequitable for the court to permit a defaulter to recover a counsel fee from one who sues him as an infringer, where the defaulter has completely disregarded his obligations under the license agreement. If no other relief is afforded appellants, we sincerely urge that this court should disallow all attorneys' fees which have been allowed defendants by the lower court.

CONCLUSION.

Appellees close their brief with a request that an additional penalty be assessed against the plaintiffs because the appeal was not warranted. Such a request is ridiculous. The award of attorneys' fees alone was sufficient grounds for an appeal. *Cohan v. Richmond and Mayer,* 86 F. (2d) 680. Under the peculiar facts of the instant case, the defendants should not have been awarded attorneys' fees under any disposition of the case.

We have heretofore referred to defendants' conduct, which forced the institution of these suits. They could only have been framed on infringe-

ments. Complainants could never have established existing licenses. Both parties, prior to the institution of the suits, had disavowed any such relationship. The defendants should not be permitted to shift from one foot to the other. When asked to license their establishments, they positively and unequivocally deny complainants' right to do business in the State. They deny complainants' right to request a license. And finally, the defendants absolutely refuse to license their establishments. They never recognized any obligations under a license. Upon being sued for infringements, defendants shift. At the trial they blandly admit they performed the numbers for purposes of profit. They then condone the performances under an alleged claim which they had theretofore disavowed and repudiated. Under the evidence in these cases, the court should reverse the District Court; and should direct that the infringements have been established by the defendants' own admissions.

Respectfully submitted,

H. W. HAUGLAND,
HERMAN D. KENIN,

Attorneys for Appellants.